In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1156

JEFFREY R. MACDONALD,

Petitioner,

v.

UNITED STATES OF AMERICA

Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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CITATIONS

MISCELLANEOUS

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Jeffrey R. MacDonald prays that a Writ of Certiorari be granted to review the judgment of the Court of Appeals for the Fourth Circuit entered in *United States v. MacDonald,* — F.2d — (Nos. 75-1870, 1871), October 27, 1978.

OPINIONS BELOW

The order of the District Court for the Eastern District of North Carolina, Fayetteville Division, denying, *inter alia,* a Motion to Dismiss Indictment Because of Double Jeopardy and Collateral Estoppel, is unreported. It was entered on July 28, 1975 and is set forth in the appendix to this Petition, *infra* (App. at pp. 3-4).

The opinion of the Fourth Circuit Court of Appeals in which that court declined to decide the double jeopary/ collateral estoppel issue in light of its decision on the speedy trial question is reported at 531 F.2d 196 (4th Cir. 1976), and is set forth in the appendix to this Petition, *infra* (App. at pp. 7-41).

The decision of this Court reversing the Court of Appeals for the Fourth Circuit in *United States v. MacDonald, id,* is reported at 435 U.S. 850 (1978).

The opinion of the Court of Appeals for the Fourth Circuit on Remand from this Court is reported at .... F.2d .... (4th Cir. 1978), and is set forth in the appendix to this Petition, *infra* (App. at pp. 42-43).

JURISDICTION

Final briefs were submitted in the court below by the parties on October 12, 1978. Without hearing oral argument the court of appeals on October 27, 1978 denied Petitioner's appeal in a 3-page decision. His petition for rehearing, with suggestion for rehearing *en banc,* was denied on November 24, 1978.

On December 15, 1978, Chief Justice Warren Burger granted Petitioner's application for an extension of time in which to file a petition for Writ of Certiorari, extending the filing date for this petition to and including January 23, 1979.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the indictment in the present case barred by the principles of *res judicata* and collateral estoppel as incorporated into the Fifth Amendment's guarantee against

double jeopardy, as of the result of the military justice proceedings in 1970 which fully exonerated the Petitioner and found that the charges against him were "not true?"

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Nature and Course of the Proceedings

The Petitioner, Dr. Jeffrey R. MacDonald, is charged in a single indictment (No. 75-26-CR-3 of the Eastern District of North Carolina) in three counts with the murders of his wife and two small children on February 17, 1970, at Fort Bragg, North Carolina. He is charged with violation of Title 18, United States Code, Section 1111.

The criminal proceedings against Dr. MacDonald were commenced on May 1, 1970, when he was arrested by military authorities, formally charged with the murders of his family by the United States and placed in confinement. The arrest took place at Fort Bragg, North Carolina, where Dr. MacDonald was serving as a medical officer in the United States Army.

Proceedings under Article 32 of the Uniform Code of Military Justice were commenced on May 15, 1970, and continued until October 13, 1970, when the Article 32 officer filed his report, including his principal finding that the charges against Dr. MacDonald were "not true."

On October 23, 1970, the commanding general who had the court martial authority in the matter entered an order dismissing the charges against Dr. MacDonald.

On January 24, 1975 Dr. MacDonald was indicted in the district court. Following a bail reduction hearing, he was released on bond.

On April 8, 1975, he filed pretrial motions in the district court to dismiss the indictment because of the denial of a speedy trial and because of double jeopardy arising out of collateral estoppel.

On July 29, 1975, the district judge denied the motions to dismiss and that order was appealed to the Court of Appeals for the Fourth Circuit.

The court of appeals entered an order on January 23, 1976, directing the dismissal of the indictment because of the government's failure to accord Dr. MacDonald a speedy trial as required by the Sixth Amendment. It withheld a ruling on the double jeopardy issue and stated:

> MacDonald claims that General Flanagan's acceptance of his exoneration in the Article 32 hearing collaterally estops the government from prosecuting him again. Alternatively, he argues that the second prosecution places him in double jeopardy. The government argues, however, that the Article 32 proceedings did not place MacDonald in jeopardy since only a court martial, which was never convened, could have convicted him. Decision of this aspect of the case depends largely on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer. It appears that

> custom imputes finality to the commanding officer's decision. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. In view of the unsettled state of this point of military law and of our disposition of the case under the speedy trial provision of the Sixth Amendment, we find it unnecessary and imprudent to render an opinion, which would in effect be advisory, on an issue of general importance to military law. *United States v. MacDonald,* 531 F.2d 196, at 209 (1976), *rev'd,* 435 U.S. 850 (1978).

The government then petitioned this Court for certiorari on the questions of the appealability of a pretrial motion to to dismiss for denial of a speedy trial and also on the merits of the speedy trial decision. On May 1, 1978, this Court reversed the judgment of the court of appeals holding the speedy trial motion not appealable pretrial, but leaving undisturbed the holding of that court as to the merits of the speedy trial issue. The matter was remanded to the court of appeals which on June 19, 1978 ordered a rehearing on the issue of the Petitioner's double jeopardy claim.

Final briefs were submitted by the parties on October 12, 1978. Without hearing oral argument the court of appeals denied Petitioner's appeal on October 27, 1978 in a 3-page decision. His petition for rehearing *en banc* was denied on November 24, 1978.

Statement of the Facts

In February 1970, Jeffrey R. MacDonald was a medical doctor on a two-year term of military duty with the Army Sixth Special Forces Group at Fort Bragg, North Carolina. He lived with his wife Colette and his two daughters, Kimberly, 6, and Kristen, 3, in a home on the Army base.

In the early morning hours of February 17, 1970, Mrs. MacDonald and the two children were murdered, and Dr. MacDonald was stabbed in the lung, suffering a near-fatal injury, along with a variety of other injuries.

Two and a half months later, on May 1, 1970, the Army charged Dr. MacDonald with the murders of his family.

Immediately thereafter the military justice process was officially begun against Dr. MacDonald by the forwarding of charges.[1] The charges were publicly announced by a press release from the Army and a press conference by the Provost Marshall of Fort Bragg.

On May 12, 1970, an order was issued directing the commencement of full Article 32 proceedings against Dr. MacDonald (STA 19).[2] These began promptly on May 15, 1970 (STA 3). The presiding officer was Colonel Warren V. Rock, an infantry officer with thirty years of service and substantial courts martial experience. He had the full-time assistance of a qualified military judge, Captain Hammond A. Beale, Jr., as his legal adviser.

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1. To the extent that analogies may be drawn between the military and civilian systems of justice, the forwarding of charges is the equivalent of the return of an indictment. This action is taken only after a preliminary investigation has been completed. *Manual for Courts-Martial,* 1969 (Rev.), para. 32b. At this point the statute of limitations ceases to run. *Manual for Courts-Martial,* 1969 (Rev.) (herein referred to as "MCM"), para. 33b; Articles 43(b), (c) of the Uniform Code of Military Justice, 10 U.S.C. §§ 843 (b), (c). It is significant that the general federal statute of limitations, 18 U.S.C. § 3282, ceases to run at the time "the indictment is found or the information is instituted." Thus, the filing of sworn charges within the military system is by virtue of the Manual of Courts-Martial and the Uniform Code of Military Justice exactly analogous to the return of an indictment under 18 U.S.C. § 3282.

2. For the purposes of this petition, reference to STA followed by a number refers to a page of the Appendix to the Brief of the United States (sur the speedy trial issue) filed with this Court in September, 1977, in *United States v. MacDonald,* 435 U.S. 850 (1978). *E.g.*, "STA 19" refers to page 19 of the appendix to the government's brief in that case.

The government was represented by two prosecutors who were fully qualified under military regulations. Dr. MacDonald was present throughout the proceedings and was represented by counsel.

The Article 32 proceedings were reconvened on May 15, 1970, for the purpose of determining "the truth of the matter set forth in the charges. . ." 10 U.S.C. § 832. At that time, the presiding officer asked counsel for the government when he would be ready to proceed with the presentation of evidence. The prosecutor stated he would be ready in two weeks. (STA 5) The matter was then recessed.[3]

At the outset of the testimonial phase of the proceedings on July 6, 1970, Colonel Rock stated that because of the extraordinary seriousness of the case and the attention it had received, the government would be required to present all the relevant evidence known to it supporting the charges against Dr. MacDonald.[4] The prosecutors acknowledged the directive of Colonel Rock and announced that they were ready to and able to proceed.[5]

Under military regulations, Colonel Rock had the right to obtain and examine, in advance of the testimonial phase, the complete investigation files prepared by the Criminal Investigation Division (CID) of the Army. However, he declined to do so in favor of requiring the prosecution attorneys to present all of the evidence in open court. This decision may have been partially motivated by the fact that the prosecutors had refused to comply with the bulk of the Petitioner's demands for discovery. (STA 20)

The prosecutors knew that if they were to carry their burden of showing that the charges were "true," they could

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3. A further continuance was granted until July 6, 1970, when the taking of testimony began.

4. Article 32 transcript, at 1.

5. *Id.*

not rely upon or assume any knowledge by Colonel Rock of the facts obtained by the CID investigation. They knew that they had to put on a complete case at the Article 32 proceedings. There is no basis in fact or in the record to believe the military prosecutors withheld evidence from Colonel Rock.

Examination of the case actually developed by the government showed that it was "wholly circumstantial and rested on a detailed, hypothetical reconstruction of the crime." (*United States v. MacDonald,* 531 F.2d 196, 199 (4th Cir. 1976); *see also* STA 29).

The government called twenty-seven witnesses. It placed in evidence the results of intensive CID laboratory examinations of hundreds of items of physical evidence. Some of the physical evidence was also examined by other experts retained by the government.[6]

The evidence presented by the prosecution at the Article 32 proceedings had been gathered over an eight month period and was the result of the efforts of more than one hundred military and civilian law enforcement investigators. These investigators had assembled material from approximately 1,500 witnesses, including a number who were in foreign countries (Art. 32 transcript, 930).

Dr. MacDonald presented a full defense to the charges against him. He testified at length under oath and was subjected to an extensive cross-examination by counsel for the government. And he was examined in detail by the presiding officer. His testimony was the same as the information he had given the military police, the CID investigators and the FBI.[7]

6. All of this physical evidence was the same evidence examined by the FBI laboratory in 1974. No new physical evidence has ever been uncovered since the original investigation of this crime in 1970.

In addition to Dr. MacDonald, the defense called twenty-nine other witnesses.

After the government and defense both presented extensive evidence at the Article 32 proceedings, the presiding officer utilized his own unique authority under the Uniform Code of Military Justice to make additional independent investigation of the facts and circumstances surrounding the murders.[8]

Among other things, he conducted his own investigation of the physical facts and made relevant experiments (STA 199-201); he obtained a psychiatric examination of Dr. MacDonald by doctors of his choice (STA 25); he called and examined his own witnesses (STA 82 to 88); and, he independently questioned the witnesses called by both parties.

During an adjournment in the testimonial phase of the Article 32 proceeding, Colonel Rock, accompanied by his legal adviser, conducted his own experiments with physical evidence at the MacDonald house. (STA 90).

The presiding officer called a total of six witnesses of his own. He also questioned, independently of counsel, nearly every one of the fifty-seven witnesses who testified at the Article 32 proceedings.

7. The government conceded in the prior proceedings before this Court the consistency of Dr. MacDonald's statements. "[H]e has presented essentially the same version of those events from his initial interview on the morning following the murders to his appearances before the grand jury in 1974 and 1975." Page 64 of Government brief in *United States v. MacDonald,* 435 U.S. 850.

8. In most ways, his powers are more analogous to those of the inquiring magistrate in Continental legal systems than to the committing magistrate of the American criminal justice system.

The Article 32 proceedings lasted five months. All the evidence the prosecutors had to support the accusations against Dr. MacDonald was produced. The hearings required more than four full weeks of in-court testimony.[9] The results were:

- a record of nearly 2,000 legal-sized pages;
- a 90-page summary of the evidence and conclusions;
- two findings.[10]

The first and principal finding was that all charges against Dr. MacDonald "are not true." (STA 24)

The second finding was that "appropriate civilian authorities be requested to investigate the alibi of Helena Stokely . . . [in regard to] . . . her whereabouts during the early morning hours of 17 February 1970 . . ." (*Id.*)

The report was filed by Colonel Rock with Major General Edward M. Flanagan, Jr., on October 13, 1970. The procedure followed subsequent to the filing is outlined in both the Manual for Courts-Martial (U.S. rev.ed. 1969) and the Uniform Code of Military Justice. The report was referred to the Staff Judge Advocate of General Flanagan's command. The Staff Judge Advocate had the authority to ask the prosecutors or the CID to comment or note objections to the report. This was part of the Staff Judge Advocate's function of advising the commanding general on proper disposition of the case. No such objections were made by the prosecuting attorneys.

9. In accordance with military custom, the proceedings were convened at 8:30 a.m. and lasted until 4:00 or 4:30 p.m. daily, with a short recess for lunch. The average day involved six to six and one-half hours of testimony.

10. Since Colonel Rock's findings were subject to further review, the procedures followed by Colonel Rock in submitting detailed summaries of the evidence, his conclusions and findings were in accord with the high standards required of district judges under Fed. R. Civ. P. 52.

Before concurring in, or disapproving of, the findings and conclusions of Colonel Rock, the commanding general was required under the Uniform Code of Military Justice to make a full, independent judicial review of the matter. He had the authority to reject the findings of Colonel Rock if they were not suppported by the record. He also had broad discretion to reject the results of the Article 32 proceedings if he found them unacceptable for any reason.

If the commanding general and his legal adviser had concluded that the findings were based upon an incomplete investigation or incomplete presentation of evidence by the prosecutors, he could have remanded the matter to Colonel Rock for further proceedings to deal with the unanswered issues. He also could have ordered a totally new investigation if he had concluded that the government's investigation was incomplete.[11] But, General Flanagan did not conclude that any of these actions was appropriate on the basis of the record before him. Instead, General Flanagan took the unusual additional step of submitting the report and record of the Article 32 proceedings to Lieutenant General Tolson, the next higher commander, for his concurrence. There is no requirement in the Uniform Code nor in the Manual for Courts-Martial for such an additional review and concurrence. The full legal authority to finally terminate the proceedings against Dr. MacDonald was held by General Flanagan. After General Tolson had made his independent review of the report of Colonel Rock and of the record the matter was returned to General Flanagan for his action.

11. The commanding general had the power at any time to suspend the Article 32 proceedings or to order them reopened for further investigation. He could have done this on his own motion or at the request of the prosecutors. *Military Justice Handbook*, Dept. of Army Pamphlet 27-8, at 49 (1957).

Finally, on October 23, 1970, General Flanagan formally entered an order dismissing the charges against Dr. MacDonald.

Dr. MacDonald's two-year term of service in the Army was to end in June 1971. However, following the dismissal of the charges against him, he applied for a hardship discharge. The government not only could have refused to grant him an early discharge, but it had the power to retain him in the military service beyond his normal discharge date for the purpose of further investigating criminal charges against him.[12]

The sequence of events established that the Army had sufficient confidence in the Article 32 proceedings and in the two independent reviews of the entire matter by General Flanagan and his legal adviser and by General Tolson to grant Dr. MacDonald's request. On December 5, 1970, he was honorably discharged from service by the Army, six months earlier than it was required to do so.

REASONS FOR GRANTING PETITION

I. The Circuit Court's Decision Regarding the Applicability of the Doctrine of Collateral Estoppel to This Case Is in Direct Conflict with the Holdings of This Court Dating Back to 1916.

This Court's decision in *United States v. Oppenheimer,* 242 U.S. 85 (1916) (Holmes, J.) gave constitutional sanction in criminal matters to the age-old doctrine of collateral estoppel. Justice Holmes, speaking for the Court, rightly noted that it would be bitterly ironic if the judge-made law of collateral estoppel, designed to protect litigants from repeated harassment by disgruntled losers, were to be less

12. *See* Army Regulation AR 600-31. The procedure of holding an officer in the service beyond the expiration date of his term of service for criminal investigation was utilized in the case of Lt. William Calley, who was extended on active duty while the Army was determining whether charges were to be brought against him.

effective when the stakes are personal liberty than when they are property. "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U.S. at 87.

In *Oppenheimer,* the doctrine of collateral estoppel was applied to preclude a subsequent criminal prosecution of the defendant, *even though a jury had never been empaneled* and *even though the first judgment of the trier of fact was later shown to be wrong as a matter of law.*[13] It is thus

13. To the extent Justice Holmes has stated the facts in *Oppenheimer* rather cryptically, we supply here a more complete statement, based on the record before the Supreme Court in that case.

On February 25, 1914, Oppenheimer and seven others were indicted for conspiracy to conceal assets in a bankruptcy proceeding. (Transcript of Record before the Supreme Court, at 14. Hereinafter referred to as "TR".) The indictment was dismissed on October 1, 1914, by District Judge Thomas, who held that the indictment was barred by a one-year statute of limitations. TR 82. Under then-existing law, appeal had to be taken within 30 days, but no appeal was taken. TR 87. Accordingly, the District Court's dismissal, unchallenged, became final by November 1, 1914.

Twenty-five days later, District Judge Hough, following the decision of Judge Thomas in *Oppenheimer,* held the one-year statute applicable to an almost identical case which raised the same issue, *United States v. Rabinowich.* Government Supreme Court Brief in *Oppenheimer* at 23. (Hereinafter, "GB".) The Government did take a timely appeal of *this* decision directly to the Supreme Court, which allowed a writ of error on December 8, 1914. GB 23.

While the *Rabinowich* case was pending before the Supreme Court, the Government obtained on December 21, 1914, a second indictment against Oppenheimer, virtually identical to the first. TR 81.

On June 1, 1915, the Supreme Court handed down its ruling in *Robinowich,* 238 U.S. 78 (1915), holding that a three-year statute of limitations applied. In so holding, the Supreme Court, of course, held that the District Court's dismissal of the first *Oppenheimer* indictment was erroneous.

However, on January 29, 1916, District Court Judge Pope quashed the second *Oppenheimer* indictment, holding that the unappealed decision of Judge Thomas in Oppenheimer's favor barred further prosecution. It is this dismissal which Justice

very clear that this Court, since the day it incorporated the doctrine of collateral estoppel into the Fifth Amendment's double jeopardy prohibition, has *never* required the attachment of jeopardy as a precondition for the application of the doctrine. Nevertheless, the effect of the Fourth Circuit's cryptic opinion here is to require that jeopardy, in some technical sense of that word, must attach before the Fourth Circuit will apply the doctrine of collateral estoppel. That view was expressly rejected by this Court in *Ashe v. Swenson,* 397 U.S. 436 (1970), where a prosecution was barred for a bank robbery, even though jeopardy had never attached for that particular robbery, because a key fact had been determined adversely to the government in a prior proceeding.

Further, the Fourth Circuit, without analysis, simply glosses over, by either ignoring or wrongly applying, this Court's well-considered statements that, to apply the doctrine of collateral estoppel, a court must look at the facts and circumstances of the prior adjudicative process, and not simply at the narrow question of whether the prior adjudication was before a trial court of complete jurisdiction. The only treatment of this issue by the Fourth Circuit is the bare conclusion which follows:

> Furthermore, because no final judgment of a tribunal having jurisdiction to try MacDonald has determined

Holmes, speaking for the Court, upheld in the *Oppenheimer* decision.

Of course, *Oppenheimer,* viewed in this context, stands for the propositions that: (a) A dismissal prior to the attachment of jeopardy can bar further relitigation of that dismissal under the rules of collateral estoppel; (b) It does not matter that the losing party could have appealed the dismissal and probably have prevailed on appeal. Rather, as long as the losing party *could have further litigated issues* (but did not do so), the principles of collateral estoppel apply as to the issue which could have been litigated; (c) Collateral estoppel is fully incorporated into the double jeopardy provisions of the Fifth Amendment.

> an issue of ultimate fact, the prosecution pending in the district court is not barred by the fifth amendment's embodiment of collateral estoppel. *See Ashe v. Swenson,* 397 U.S. 436, 443 (1970). The absence of such a judgment distinguishes this case from *United States v. Oppenheimer,* 242 U.S. 85 (1916) and *United States v. Utah Construction & Mining Co.,* 384 U.S. 394 (1966), on which MacDonald primarily relies. (App., 43)

First, this statement in itself is a departure from the Fourth Circuit's earlier statements that MacDonald's collateral estoppel arguments "are not fanciful," *United States v. MacDonald,* 531 F.2d 196, 199 (4th Cir. 1976). In its prior opinion in this case that court declared:

> It appears that custom imputes finality to the commanding officer's decision to dismiss charges after an Article 32 proceeding. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. 531 F.2d 209.[14]

Second, the Fourth Circuit's simplistic conclusion that collateral estoppel is not applicable here, blatantly ignores the criteria *Utah Construction* (cited in the Fourth Circuit statement quoted above) set up to measure whether collateral estoppel effect should be given to a prior administrative decision. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." 384 U.S. at 422. Moreover, as this Court has further stated, "[n]o one set of facts,

14. This statement is still true. The present case appears to be the first one ruling on this issue, and the present Fourth Circuit opinion treating this important issue of first impression is a model of conclusionary statements without reasons.

no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas." *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 333-334 (1971).

Had the court below analyzed the criteria which this Court announced in *Utah* for determining whether to apply collateral estoppel, it would have been compelled to dismiss the indictment. Those criteria are as follows:

1. *Was the prior decision rendered in a judicial setting?* In this case, the answer is unequivocally yes. The Article 32 proceeding was conducted before an officer acting in an impartial "judicial" capacity, *United States v. Tomaszewski,* 8 USCMA 266, 24 CMR 76, 79 (1957).

2. *Was the prior decision rendered by an authority who had jurisdiction to consider all facts actually found?* The answer is yes. The Article 32 officer was charged under the Uniform Code and Manual for Courts Martial with determining whether the charges against Dr. MacDonald were "true." In fact, he determined that they were "not true." Those findings, supported by the 2000-page verbatim transcript and record, and 90-page summary of the findings and evidence were subject to review by higher military authority.

3. *Was the prior decision made after an adversary hearing?* Yes again. Each party was represented by counsel; there was complete right of cross examination of all witnesses; there was complete incentive to litigate on the part of the government, since the Article 32 officer required the government to present all of its evidence, and there is no indication that it did not follow this directive. There was a verbatim transcript of testimony, which was given under oath. All the indicia of formal, due process, adversary proceedings are present here.

4. *Did each party have the opportunity for court review of the factfinding process?* Yes. If the Article 32 process had resulted in referring the matter to trial, Dr. MacDonald would have been tried by court martial. However, the government had even a better deal: even though the Article 32 process resulted in a recommendation that Dr. MacDonald not be prosecuted, higher military authority could have ordered a court martial trial anyway, if in their view the Article 32 record warranted such proceedings.

Moreover, had higher authority concluded that the Article 32 proceedings were in any way deficient, that authority could have ordered either that the Article 32 proceedings be reopened, or that new proceedings be instituted. But, neither of these courses was chosen by the government, though they could have been. The point is, there was complete opportunity for review of the Article 32 proceedings prior to the dismissal of the charges against Dr. MacDonald, and prior to his honorable discharge from the military.

5. *Is there either need or justification for further proceedings?* No. All the evidence in existence today was in existence in 1970, and in fact, was used at the Article 32 hearing. Dr. MacDonald was extensively cross examined at the Article 32 proceeding. The forum which heard the evidence was a fair one to the government. Nothing remains to be said or done about this case, except to end it, for each side has had a fair chance already to litigate its position.

None of these criteria were evaluated by the Fourth Circuit in its latest opinion. This is particularly strange and unfortunate in that in its prior opinion, 531 F.2d 196, the Fourth Circuit showed that it knew Dr. MacDonald's claims were substantial. And, it also knew that the issue of what collateral estoppel effect is to be given an Article 32 proceeding such as this one—the most thorough ever conducted

by military authorities—had never (until now) been settled by judicial decision. This Court should thus take the opportunity now to resolve on a more rational and reasoned basis than the Fourth Circuit did, this important point of military law, and the even more important point of general constitutional law regarding the applicability of collateral estoppel in criminal matters.

II. The Circuit Court's Opinion Is In Conflict with the Decision of the Second Circuit Regarding Criteria for Applying the Doctrine of Collateral Estoppel.

The Fourth Circuit ignored this Court's holdings that collateral estoppel must be viewed on a case-by-case basis, without regard to magic formulae as to whether jeopardy has attached in some technical sense, and with due regard for the facts of the prior adjudicative process. In doing so, the Fourth Circuit's analysis (or lack of analysis) directly contradicts the reasoned approach of the Second Circuit in *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (1961) (Friendly, J.), *cert. denied*, 398 U.S. 986 (1962). In that case, the Second Circuit considered procedural issues created by two district courts' entertaining proceedings to determine if arbitration would be ordered under a contract between the parties. The First Circuit had stayed an injunction from the district court in Puerto Rico prohibiting a contract arbitration in New York.[15] In so doing, the First Circuit expressed its view that the party opposing arbitration had not sufficiently raised factual issues as to be entitled to a stay of the arbitration called for in the contract.[16] However, independently, a district court in New

15. 280 F.2d 915 (1st Cir.), *rehearing denied*, 280 F.2d 932, *cert. denied*, 364 U.S. 911 (1960).

16. The District Court of Puerto Rico acceded to the First Circuit's opinion, allowing the New York proceedings to go forward.

York later granted a trial to the party opposing arbitration on the issue of the making of the contract which contained the arbitration clause. The Second Circuit, while finding that this district court ruling was not an appealable interlocutory order within the meaning of 28 U.S.C. § 1292(a) and (b), nevertheless issued an extraordinary writ of mandamus to the New York district court precluding that court from holding a trial.

In doing so, the Second Circuit, through Judge Friendly, decided that collateral estoppel effect should be given the ruling of the First Circuit that the party opposing arbitration had not raised sufficient factual issues to warrant a trial on the making or existence of a contract. The Second Circuit opinion explicitly recognized that the First Circuit's finding in this regard was not a "final" judgment in any judicial sense, because it was interlocutory in nature and, as a rule of law, not binding on the trial court as a technical matter.

Nevertheless, the Second Circuit adopted a pragmatic test for the application of the rule of collateral estoppel (paralleling this Court's test in *Utah Construction* and *Blonder-Tongue*). Judge Friendly quoted Justice Brandeis' phrase that "final" is "a word of many meanings," 297 F.2d at 89. Thus, the Second Circuit chose to give "finality" to the First Circuit's holding, even though it was not "final" in a technical sense. In doing so, the Second Circuit said:

> Whether a judgment, not "final" in the sense of 28 U.S.C. § 1291, ought nevertheless to be considered "final" in the sense of precluding further litigation of the same issue, turns upon such factors as the nature of the decision (*i.e.*, that it was not avowedly tentative), the adequacy of the hearing, and the opportunity for review. "Finality" in the context here relevant may mean little more than that the litigation of a particular

> issue has reached such a stage that a court sees no really good reason for permitting it to be litigated again. 297 F.2d at 89.

This practical and reasoned approach to when collateral estoppel effect will be given to prior findings is exactly the approach taken by this Court in *Parklane Hosiery Company, Inc. v. Shore*, — U.S. —, 47 L.W. 4079 (decided January 9, 1979), in which Justice Stewart appears to prefer a case by case analysis over a mechanical application of technical rules. These rulings could hardly be more at odds with the mechanical approach taken by the Fourth Circuit. That court stressed that because there was "no final judgment," jeopardy in a technical sense had not attached, and that the prior adjudication was not in a forum which ultimately could have convicted Dr. MacDonald.[17]

The Fourth Circuit's mechanical approach to when collateral estoppel effect should be accorded prior adjudicative proceedings presents a clear conflict with the Second Circuit *Lummus* decision and this Court's approach in the decision announced earlier this month in *Parklane Hosiery Company, Inc. v. Shore, supra*. This Court should resolve the conflict so that the simplistic error and confusion of the Fourth Circuit's current opinion does not spread throughout the entire field of collateral estoppel and thus render unavailable the significant savings in judicial resources which do flow from a reasoned and flexible application of the collateral estoppel doctrine.

17. The Fourth Circuit, in its insistence that only a "tribunal having jurisdiction to try MacDonald . . . [on] an issue of ultimate fact" can render a decision which will have collateral estoppel effect, is dangerously close to espousing a doctrine repudiated by this court in *Blonder-Tongue*, that is, the doctrine of mutuality.

It is true that the government could not have convicted Dr. MacDonald during the Article 32 proceeding or post-hearing review, but that is not any reason to ignore the findings of those proceedings. *Blonder-Tongue, Utah*, and *Lummus, supra*, all reject the mechanical approach to when collateral estoppel principles will apply, and instead focused on the process of adjudication; if that process is fair, then it is fair to bind the parties who participated in the result.

Mutuality, as a doctrine which the Fourth Circuit seems to be espousing, is "destitute of any semblance of reason, and . . . a 'maxim which one would suppose to have found its way from the gaming table to the bench.'" *Blonder-Tongue, supra*, 402 U.S. at 323.

III. The Fourth Circuit's Current Opinion Undermines Important Policies Embodied in the Uniform Code of Military Justice and the Manual for Courts Martial.

If the decision below is left standing the result will be to change significantly the stature of the Article 32 proceeding in the military justice system. An Article 32 proceeding is far different from a grand jury proceeding or a preliminary hearing. It is an inquiry into the truth of the charges, not whether there is probable cause for further action.

Although some analogies may be made between an Article 32 proceeding and a grand jury proceeding or preliminary pretrial hearings in civilian courts, it is simplistic and wrong to extend these comparisons too far. To proceed by analogy here is to overlook very material differences between an Article 32 proceeding (and the review which follows it), and civilian proceedings. For an Article 32 proceeding is specifically an inquiry into the "truth" of the charges, and is not, in that sense, a "probable cause" type of proceeding. The Manual for Courts Martial states this directly:

> The purpose of the investigation required by Article 32 *is to inquire into the truth of the matters set forth in the charges*, the form of the charges, and to secure information upon which to determine what disposition should be made of the case. It is not the function of

> the investigating officer to perfect a case against the accused, but to ascertain and impartially weigh all available facts in arriving at his conclusion. He is required to conduct a thorough and impartial investigation and is not limited to the examination of witnesses and documentary evidence listed on the charge sheet or mentioned in the papers accompanying the charges. He should extend his investigation as far as may be necessary to make it thorough. The investigation should be dignified and military, as brief as is consistent with thoroughness and fairness, and limited to the issues raised by the charges and to the proper disposition of the case. Manual for Courts Martial, § 34a (emphasis supplied).

The Article 32 proceeding has been called a "juristic event of substantial gravity" by the Court of Military Appeals, *United States v. Cunningham,* 12 USCMA 402, 405, 30 CMR 402, 405 (1961). It is a "judicial" proceeding, *United States v. Nichols,* 8 USCMA 119, 124, 23 CMR 343, 348 (1957); *United States v. Tomaszewski,* 8 USCMA 226, 269, 24 CMR 76, 79 (1957).

The Article 32 proceeding is unlike grand jury investigations. Nor is it like pretrial proceedings where prosecutors routinely present just enough evidence to get a trial and defense counsel sit quietly by, hoping to glean some discovery while not revealing any part of the defense case. Rather, it is an adversary, adjudicating format designed to encourage the earliest resolution of cases which may be baseless, and to encourage the *defense* to participate actively in this process:

> [there is an] understandable caution on the part of defense attorneys [which] sometimes results in charges being referred for trial and acquittal resulting when, if the full story had been brought out during the Article 32 investigation, the expense to the Government and hardship to the accused of a trial might have been completely avoided. R. Everett (formerly a Commissioner for the United States Court of Military Appeals), *Military Justice in the Armed Forces of the United States* (1956) at 172.

The effect of the Fourth Circuit's decision in this case will be to undermine completely all incentive to end military justice proceedings at the earliest opportunity—the Article 32 stage. If a defendant cannot rely on ending the matter by successfully participating in the Article 32 process (which, remember, is subject to military review even if the hearing officer recommends that there be no trial), then the fundamental "truth-finding" character of the Article 32 will be subverted. Instead it will become just another of the pretrial processes at which prosecution and defense play games with each other; the one trying to put on just enough evidence to get a recommendation for a referral to trial; the other trying to find out as much as possible of the prosecution case without doing anything to present the defense rebuttal to prosecution evidence. What will be left is the gutting of Article 32 by the Fourth Circuit's uninformed and unreasoned decision in this case.

IV. The Fourth Circuit's Decision Allows the Government to Ignore Longstanding Government Policies Which Allocate Jurisdiction to One Agency of Government—Here, the Military—and Preclude Other Agencies of the Government from Repeatedly Harassing Defendants Who Have Already Defended Themselves.

In its relations with foreign governments, the United States government has specifically contended that an Article 32 investigation such as the one in the present case, if it exonerates the accused, completely precludes the foreign civilian government from proceeding against the American soldier. Thus, the Army has taken the position,

presumably sanctioned by the Department of State, that "a [United States military] determination not to try, made after [an informal investigation or an Article 32 proceeding] is an exercise of American jurisdiction and bars subsequent trial by the [foreign host] State." Snee & Pye, *Status of Forces Agreements—Criminal Jurisdiction* (1957) at 67. It is ironic—and wrong—that the United States Government claims that an Article 32 investigation will preclude a foreign civilian government from trying a man exonerated by that investigation, but will not accord the same effect to such an investigation in American federal civilian courts.

This is particularly disturbing in light of the agreement entitled *Memorandum of Understanding Between the Departments of Justice and Defense Relating to Investigation and Prosecution of Crime Over Which the Two Departments Have Concurrent Jurisdiction* (July 1955). (See App., 45-48.) In this case, the military clearly had primary jurisdiction to investigate and prosecute these crimes. Under the terms of the *Memorandum*, that jurisdiction was "exclusively" in the military justice system.[18] In 1970, when these crimes were under investigation and prosecution, the military was the *only* agency of the government empowered by the *Memorandum* to deal with the crimes. The inference is unavoidable that the United States, in allocating jurisdiction to the military, was reasonably confident that its interests could and would be protected by the military justice system. Thus, a defendant in the military justice system could justifiably rely on that system *exclusively* to reach a just result in his case. In the present situation,

18. See *Memorandum*, para. 3. No formal transfer of jurisdiction ever took place, and in fact the military conducted the entire prosecution and investigation in accordance with the provisions of the *Memorandum*.

that meant utilizing the Article 32 process as it was intended to be used: to end baseless charges at the earliest possible moment.

But now the Fourth Circuit's decision in effect allows the government to have it both ways: if it "wins" in the military system, of course it "wins." But if it "loses" in that system, then the civilian system can take over and try again. That decision simply makes a mockery of the *Memorandum* which has as its purpose the division of jurisdiction (when there is overlapping jurisdiction) "exclusively" to one agency or another for full, complete and final resolution of the problem.

Here, one governmental agency, the military, after full and fair hearings, determined that the charges were "not true." Now to allow the government to ignore the results of the Article 32 process and the subsequent military review means that, despite the "finality" which the United States claims for its Article 32 *vis a vis* foreign governments, Article 32 proceedings which result in dismissal of charges against soldiers will *never* finally end the matter, as long as there is someone in the Justice Department who wants to take another cheap shot at a man who has already run the gauntlet.

This Court should take this opportunity to review the government's own adherence to its policies against multiple and overlapping proceedings against the same accused for the same alleged offense,[19] and satisfy itself that the United States is fairly following the beneficial rule that one trial is enough.

19. *Cf.*, similar federal policies against federal prosecutions for offenses which may also have been prosecuted under state laws. *Petite v. United States*, 361 U.S. 529 (1960).

CONCLUSION

For all of the above reasons, this Court should issue the Writ of Certiorari requested.

Respectfully submitted,

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MICHAEL J. MALLEY
Counsel for the Petitioner
Jeffrey R. MacDonald

KENNETH A. LETZLER
Of Counsel

January, 1979

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Appendix

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA FAYETTEVILLE DIVISION

No. 75-26-CR-3

United State of America,

Plaintiff

vs.

Jeffrey R. MacDonald,

Defendant

ORDER ON DEFENDANT'S REMAINING PRE-TRIAL MOTIONS

The defendant who stands indicted on three counts of first-degree murder has filed ten pre-trial motions which have been extensively briefed and argued by defendant's counsel and counsel for the government over a period of almost four months. Two of the motions on which defendant seemed to place greatest reliance have been the subject of separate lengthy orders by the court. This order will contain the court's rulings on the remaining pre-trial motions of the defendant.

MOTION FOR INSPECTION AND COPYING OF GRAND JURY TESTIMONY

By this motion the defendant seeks transcripts of his own grand jury testimony, the testimony of all expert witnesses before the grand jury and the testimony of all other witnesses before the grand jury. The government has heretofore furnished the defendant a transcript of his own grand jury testimony, and that phase of the motion is now moot. The court having thoroughly considered defendant's motion, the briefs and argument of counsel and the results of the court's own research, is of opinion that the motion

ought to be and is hereby denied in the discretion of the court and on authority of *United States v. Andeson (sic)*, 481 F.2d 685 (4th Cir. 1973).

MOTION FOR DISCOVERY AND INSPECTION OF DOCUMENTS, ETC., PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 16 AS AMENDED

By this motion the defendant seeks in effect to obtain a copy of the government's entire file including photographs, all tangible evidence and exhibits of every kind and description. In response to the motion the government has agreed to make available to the defendant in advance of the trial or at the trial pursuant to the provisions of the Jencks Act, 18 U.S.C. § 3500, certain portions of the evidence sought to be discovered by the motion. Except as thus agreed by the government, the court is of opinion that the motion is overly broad and should be and is hereby denied in the discretion of the court. *United States v. Anderson*, 481 F.2d 685 (4th Cir. 1973). The court reserves the right to modify this ruling should it appear later in the proceedings that the ends of justice require such action.

MOTION TO DISMISS INDICTMENT FOR DEFECTS IN THE GRAND JURY PROCEEDINGS AND PROSECUTORIAL MISCONDUCT BEFORE THE GRAND JURY

In this motion defendant alleges that the appearance before the grand jury of Victor J. Woerheide, Esq., an attorney for the Department of Justice, was unlawful and in violation of the provisions of 28 U.S.C. § 515(a), F.R.Crim.P., Rule 6(d), and the rights of the defendant under the Fourth, Fifth and Sixth Amendments of the Constitution. The court finds that Mr. Woerheide's appearance before the grand jury was duly and lawfully commissioned by the Attorney

General of the United States, and the motion as based on this ground is denied on authority of *United States v. Weiner*, 392 F.Supp. 81 (N.D.Ill. 1975). *See also In re Persico*, 44 L.W. 2011 (2nd Cir., June 19, 1975).

From the evidence offered the court finds no improper conduct on the part of the government attorneys during the questioning of defendant before the grand jury and the motion as based on this ground is denied.

The defendant has not offered evidence to sustain his allegation that the grand jury received and considered the testimony of improper witnesses, and the motion as based on this ground is denied.

From the evidence offered the court finds that the attorneys for the government did not intentionally and falsely misstate the scope and objectives of the grand jury investigation in order to unlawfully induce the testimony of the defendant and other persons, and the motion as based on this ground is denied.

MOTION TO DISMISS INDICTMENT BECAUSE OF DOUBLE JEOPARDY AND COLLATERAL ESTOPPEL

In this motion defendant alleges that pursuant to Article 32 of the Uniform Code of Military Justice a duly-appointed military officer conducted "judicial proceedings" during the months of June through September of 1970 including four full weeks of testimony during which time the government presented all of the evidence known to it bearing on the crimes in question; that at the conclusion of these proceedings the charges against the defendant, Jeffrey R. MacDonald, were dismissed as being without foundation; and that in October, 1970, the Commanding General charged with the final authority in the matter "entered an order dismissing finally and with prejudice the charges against the defendant." On the basis of these proceedings defendant

contends that the January 1975 grand jury indictment is violative of his double jeopardy and due process of law rights under the Fifth Amendment and that "re-charging of the defendant under the circumstances described above is barred by the doctrine of collateral estoppel." In their briefs the parties have cited no case determining the exact question thus raised nor has the court's own research revealed a case directly in point. The recent case of *Breed v. Jones*, ... U.S. ....., 95 S.Ct. 1779, 43 L.W. 4644 (May 27, 1975), cited and relied upon by defendant, is clearly distinguishable. This court is of opinion that jeopardy did not attach by reason of the Article 32 investigation proceedings conducted by the military and that the government is not collaterally estopped by reason of those proceedings. It is not perceived how the due process rights of the defendant here have been prejudiced by the proceedings, and defendant's motion must therefore be and is hereby denied.

MOTION TO SUPPRESS EVIDENCE OBTAINED AS A RESULT OF UNLAWFUL SEARCH AND SEIZURE AND TO DISMISS THE INDICTMENT

In this motion the defendant alleges that during the course of the Article 32 proceedings at Fort Bragg in 1970 while he was under house arrest and confined to his quarters at Fort Bragg government agents "repeatedly and unlawfully entered the defendant's rooms, conducted general searches, and examined, read and copied papers, documents and materials pertaining to the defense of the defendant" and that during that time and thereafter illegal wiretaps were placed upon telephones used by the defendant. The government has categorically denied all such allegations under oath. Even if defendant's allegations and his evidence in support thereof are accepted as true,

he is unable to point to any information or evidence gained by the government as a result of such alleged unlawful activity, and defendant's motion is therefore denied. This ruling is made without prejudice to defendant's rights to renew his motion with respect to any illegally-obtained evidence which the government may seek to introduce upon the trial of the case.

MOTION TO SUPPRESS EVIDENCE PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 41(e)

By this motion defendant seeks to suppress as evidence against him "all items seized and the fruits thereof of searches and seizures from the graves of Colette and Kimberley MacDonald" following the exhumation of the bodies of these two murder victims by agents of the government in August or September, 1974. Upon consideration of the evidence bearing on the question raised by this motion and the briefs and argument of counsel the court is of opinion that the graves of Colette and Kimberley MacDonald were lawfully opened at the instance of the government; that the defendant does not have standing to contest the opening of the graves; and that they were not opened in violation of the applicable statutes of New York, the state in which the exhumations occurred. The defendant's motion is therefore denied.

MOTION TO DISMISS INDICTMENT FOR DENIAL OF RIGHT TO SPEEDY PROSECUTION AND TRIAL

By this motion the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the

delay on the grounds that "because of government bureaucracy" the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been "accused" of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion*, 404 U.S. 307 (1971), the motion of defendant is denied.

In connection with this motion the defendant also moved to depose certain officials of the department of Justice, but since that time the court is informed that the defendant has filed an action under the Freedom of Information Act in the District of Columbia for the purpose of obtaining further evidence, and defendant's motion for leave to conduct further discovery in this action is denied.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

July 28, 1975.

[196] UNITED STATES of America, Appellee,

v.

Jeffrey R. MacDONALD, Appellant.

Nos. 75-1870, 75-1871.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 8, 1975.
Decided Jan. 23, 1976.

• • •

[198] Before CRAVEN, BUTZNER and RUSSELL, Circuit Judges.

BUTZNER, Circuit Judge:

Jeffrey Robert MacDonald appeals from the denial of several motions relating to his prosecution for the 1970 deaths of his wife and two daughters.[1] We conclude that the [199] delay of four and one-half years, dating from the Army's accusation and detention of MacDonald in May 1970 to his indictment in January 1975, even when allowances are made for several intervals, violates the right to a speedy trial guaranteed by the sixth amendment.[2] We therefore reverse and order dismissal with prejudice.

I

We stayed MacDonald's trial and allowed this interlocutory appeal pursuant to our decision in *United States v.*

1. The district court has jurisdiction because the crimes were committed on a military base. 18 U.S.C. §§ 7(3), 1111, and 3231.

2. "In all criminal proceedings, the accused shall enjoy the right to a speedy and public trial . . .." U.S. Const. amend. VI.

Lansdown, 460 F.2d 164, 170-71 (4th Cir. 1972).[3] There, we held that 28 U.S.C. § 1291 did not bar an interlocutory appeal in criminal cases where important rights, collateral to the main action, would be irreparably lost unless considered before trial. *But see United States v. Bailey,* 512 F.2d 833 (5th Cir. 1975). In *Lansdown* the appeal was from an order rejecting a plea of double jeopardy. We held that post-trial consideration of the issue could provide only inadequate relief because the double jeopardy prohibition was intended to prevent the hardship of undergoing a second trial. *See Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The denial of MacDonald's plea of double jeopardy, like Lansdown's, is a proper subject for interlocutory review, but for reasons discussed in Part IV, we believe it preferable not to decide this issue. Instead, we have rested our decision on the sixth amendment's provision for a speedy trial.

Pendent to the double jeopardy claim, and closely related to it, is MacDonald's affirmative defense of denial of a speedy trial. This sixth amendment claim is also collateral and can be decided without considering the merits of the charges against MacDonald. The guarantee of a speedy trial is a fundamental constitutional right. *Braden v.*

3. In our order of August 15, 1975, allowing MacDonald's petition for an interlocutory appeal, we noted his contentions that he had been denied his rights against double jeopardy and to a speedy trial. We then concluded ". . . that the contentions made are not frivolous and that the rights asserted are too important to be denied review, and if review is postponed until after the trial of the case, claimed rights will have been irreparably lost. *United States v. Lansdown* . . ."

We also allowed MacDonald to appeal issues that would otherwise be subject to the final judgment rule, saying: "In view of our accepting the appeal of [the orders overruling the double jeopardy and speedy trial defenses], we will also consider the other questions sought to be appealed, which, if not now presented, might occasion further delay in terminating this litigation." *See* part IV *infra.*

Judicial Circuit Court, 410 U.S. 484, 489-90, 93 S.Ct. 1123, 35 L.Ed.2d 443 (1973); *Klopfer v. North Carolina,* 386 U.S. 213, 223-25, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967); *Kane v. Virginia,* 419 F.2d 1369, 1371-73 (4th Cir. 1970). Not every speedy trial claim, however, merits an interlocutory appeal. Generally, this defense should be reviewed after final judgment. It is the extraordinary nature of MacDonald's case that persuaded us to allow an interlocutory appeal.

The hearing conducted by the Army in 1970 lasted for more than a month, and the government estimates that the trial would take six to eight weeks. The prosecution's case is wholly circumstantial and rests on a detailed, hypothetical reconstruction of the crime. Witnesses, who have scattered across the country in the last five years, must be interviewed and assembled at great expense to both the government and the defense.

MacDonald's collateral defenses of double jeopardy and denial of a speedy trial are not fanciful. Never before, as we mention in Part IV, has a soldier been prosecuted by civilian authorities after being exonerated by his commanding officer following an Article 32 hearing; and a delay of five years between the initiation of prosecution and trial is extraordinary. Had we denied the interlocutory appeal and subsequently sustained either of MacDonald's collateral defenses, all of the burdens on the [200] court and the parties of a prolonged, expensive trial would be for naught. These factors, which we regard as unique, were the basis for allowing this appeal.

II

In the early morning of February 17, 1970, military police received a call for help from Captain MacDonald, a physician stationed at Fort Bragg, North Carolina. Upon arriving at the family's quarters, the police found Mrs.

MacDonald and the couple's two daughters clubbed and stabbed to death. MacDonald told the police that screams of his wife and six-year-old daughter awoke him from the couch in the living room. He said that during a short struggle four assailants stabbed him and knocked him unconscious. Upon regaining his senses, he attempted to revive his family and telephoned for help.

The military police, the Army's Criminal Investigation Division (CID), the F.B.I., and the Fayetteville, North Carolina, police department immediately began an investigation of the crime. Examination disclosed that each member of the MacDonald family had a different blood type. The location of the victims' blood in the apartment and the presence of one daughter's blood on MacDonald's glasses cast doubt on MacDonald's account. Similarly, the presence of stray fibers from his pajama top in the master bedroom did not correspond with MacDonald's statement that it was ripped in a struggle in the living room. Torn and bloody pieces of surgical gloves, apparently of a type kept by MacDonald, were found near the victims. Although there were numerous unidentified fingerprints in the apartment, no direct evidence of the alleged intruders was found. From these and other circumstances, investigators theorized that MacDonald had killed his family and staged the murder scene to cover up his crime.

On April 6, 1970, the CID questioned MacDonald and informed him that he was under suspicion. That same day he was relieved of his medical duties and restricted to quarters by his commanding officer. On May 1, 1970, the Army formally charged him with the murders.

Major General Edward M. Flanagan, Jr., Commanding General of the unit to which MacDonald was assigned, appointed Colonel Warren V. Rock to investigate the charges, with the assistance of a legal officer, in accordance with Article 32 of the Uniform Code of Military Justice. Colonel Rock's final report described the manner in which the Article 32 proceedings were conducted:

> "In view of the fact that both government and defense were represented by counsel, the hearing was conducted in generally the same format as a trial. Government presented its evidence and rested, defense did likewise and finally the Article 32 Officer called for witnesses and evidence. In all instances opposing counsel was given the full right of cross examination. It was necessary to give considerable latitude to counsel and permit the introduction of some hearsay-type evidence for both sides. The legal advisor sat next to the Investigating Officer throughout the hearing and his sole function was to assist him in making proper legal rulings on all questions that arose."

The government called 27 witnesses and MacDonald 29, including many character witnesses. He himself testified and was subjected to extensive cross-examination.

At the conclusion of the Article 32 proceedings, Colonel Rock filed an exhaustive report in which he recommended that "[a]ll charges and specifications against Captain Jeffrey R. MacDonald be dismissed because the matters set forth in all charges and specifications are not true. . . ." He also recommended that the civilian authorities investigate a named suspect. On review of Colonel Rock's report, General Flanagan dismissed the charges on October 23, 1970, and reported this to the Commanding General of Fort Bragg, who took no further action. Shortly afterward, the Army released MacDonald from quarters and, underscoring the finality of the military proceed- [201] ings, it granted him

an honorable discharge for reasons of hardship in December 1970.[4]

Following MacDonald's discharge, the Department of Justice asked the CID to continue its investigation. The CID complied, conducting 699 interviews. At the request of the department, it sent the weapons and the victims' clothing to the F.B.I. laboratory in July 1971 and in August furnished the Treasury Department's laboratory other items for analysis. The CID completed its field investigation in December 1971, and in June 1972 it transmitted to the Justice Department a 13-volume report recommending prosecution. A number of government attorneys studied the report and asked for further investigations. The CID filed two supplemental reports, but upon receiving a request for additional investigation, it suggested convening a grand jury before it expended any more effort. Finally, in August 1974 the government started presenting the case to a grand jury. Concurrently, the F.B.I. examined several items from the MacDonald house, and it exhumed the bodies of Mrs. MacDonald and the children to obtain hair samples.

Shortly after his discharge, MacDonald moved to California where he resumed the practice of medicine. In 1971 he was again interviewed by the CID. Beginning in January 1972 and continuing through January 1974, MacDonald, first in person and then through letters by his attorneys, requested the government to complete its investigation. He repeatedly offered to submit to an interview by the government attorneys in charge of the case.[5] The attorneys, however, declined to question him and to advise when their investigation would be completed. The correspondence appears to have come to an end in January 1974, leaving MacDonald in suspense.[6] MacDonald was subsequently subpoenaed to appear before the grand jury. He waived his right to remain silent and testified on two occasions for a total of more than five days.

The grand jury indicted MacDonald on January 24, 1975. He was promptly arrested in California and a week later admitted to bail. He moved to have the indictment dismissed, contending that the government's delay in obtaining it

4. MacDonald's discharge barred any further military proceedings against him. *United States ex rel. Toth v. Quarles,* 350 U.S. 11, 76 S.Ct. 1, 100 L.Ed. 8 (1955).

5. For example, on March 27, 1973, MacDonald's attorney wrote an attorney in the criminal division of the Department of Justice:

> "I am taking the liberty to again urge upon you and the Justice Department to accept our offer to submit Dr. MacDonald to an in depth on-the-record interview by your office. "It seems to me that there are mutual advantages to our suggestion. From the standpoint of your office it would present the opportunity to perhaps obtain answers to some of the questions that may have arisen in your minds as a result of the study of the record and investigative reports in this case. From our standpoint we believe that an interview with Dr. MacDonald can only confirm the correctness of the finding of the Army's own initial hearing officer, Colonel Rock."

6. On January 8, 1974, MacDonald's counsel wrote:

> "It is with some reservations that I write this letter to you to inquire about the status of your Department's review of the investigation of the deaths of the MacDonald family at Ft. Bragg, North Carolina. However, in fairness to my client who has lived with the twin tragedies of those deaths and the unfounded suspicion of himself in connection with them, that I ask whether a final decision has been made in connection with any Federal criminal action against him. If such a decision has not yet been made may I inquire as to when we may reasonably expect it to be made.
>
> "I again renew to you our previously stated offer to submit Dr. MacDonald to full questioning by attorneys of the Department of Justice."

The chief of the General Crimes Section replied on January 23, 1974:

> "For your information, this case is under active investigation and will remain under consideration for the foreseeable future. "I do not believe it would serve any useful purpose at this time to accede to your request that Jeffrey MacDonald be questioned by attorneys from the Department of Justice."

denied him the right to a speedy trial. The district court denied the motion, holding that MacDonald's right to a speedy trial did not arise [202] until the government accused him of the crime by the return of the indictment in January 1975.[7]

III

To determine whether a person charged with crime has been denied a speedy trial in violation of the sixth amendment, it is necessary to weigh the conduct of both the prosecution and the defendant. *Barker v. Wingo,* 407 U.S. 514, 530, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972). Recognizing that this balance compels an ad hoc appraisal of each case, *Barker* identified four factors that must be considered. They are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U.S. at 530, 92 S.Ct. at 2192. We will assess each separately.

Length of delay. The critical issue concerning this aspect of the case is the identification of the event, and consequently the date, marking the beginning of the delay. The district court accepted the government's position that MacDonald's

7. In its order denying MacDonald's motion, the district court said:

> "By this motion [to dismiss the indictment for denial of the right to speedy prosecution and trial] the defendant takes the government to task for pre-indictment delay amounting to almost five years between the date of the crime on February 17, 1970, and the return of the indictment by the grand jury on January 25, 1975. The government has undertaken to justify the delay on the grounds that 'because of government bureaucracy' the facilities of the crime laboratory of the Federal Bureau of Investigation were not brought into the case until the grand jury was finally convened in August of 1974. The right to a speedy trial under the Sixth Amendment does not arise until a person has been 'accused' of a crime, and in this case this did not occur until the indictment had been returned. On the authority of *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the motion of defendant is denied."

right to a speedy trial arose only after he was indicted in January 1975. MacDonald acknowledges that no significant delay has occurred since then. He contends, however, that the delay commenced when the Army formally charged him with murder on May 1, 1970, and restricted him to quarters. The length of delay, therefore, depends entirely on whether the pre-indictment delay on which MacDonald relies is of constitutional significance.

In *United States v. Marion,* 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), the Court held that a three-year delay between the commission of a crime and indictment did not infringe the right to a speedy trial. The defendants in that case, however, were not arrested or formally accused of crime until the return of the indictment. Noting this, the Court carefully avoided adopting a simplistic rule that pre-indictment delay is always immaterial. Instead, referring to the values which the speedy trial provision safeguards, the Court explained that arrest furnishes an alternative starting point for determining the length of delay. It said:

> "[I]t is readily understandable that it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment.
>
> "Invocation of the speedy trial provision thus need not await indictment, information, or other formal charge. . ." 404 U.S. at 320-21, 92 S.Ct. at 463.

Reiterating these principles in *Dillingham v. United States,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975), the Court held that even when the defendant has not shown actual prejudice, the time elapsing between arrest and indictment must be considered in appraising the alleged denial of a speedy trial. It is, therefore, essential to determine whether MacDonald's military arrest "engage[d] the par-

ticular protections of the speedy trial provision of the Sixth Amendment." *Marion,* 404 U.S. at 320, 92 S.Ct. at 463.

On May 1, 1970, MacDonald's commanding officer charged under oath that MacDonald, acting with premeditation, murdered his wife and two daughters. Simultaneously, the commanding officer [203] recommended trial by general court-martial.[8] The charge was the functional equivalent of a civilian arrest warrant, for under U.C.M.J. Article 10, 10 U.S.C. § 810, it subjected MacDonald to arrest or confinement.[9] Like its civilian equivalent, military arrest must be based on probable cause.[10] The status of an officer restricted

8. U.C.M.J. Art. 30, 10 U.S.C. § 830, provides:

"(a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—

(1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and

(2) that they are true in fact to the best of his knowledge and belief.

"(b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable."

9. U.C.M.J. Art. 10, 10 U.S.C. § 810, provides:

"Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require; but when charged only with an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement. When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him."

10. U.C.M.J. Art. 9, 10 U.S.C. § 809, provides:

"(a) Arrest is the restraint of a person by an order, not imposed as a punishment for an offense, directing him to remain within certain specified limits. Confinement is the physical restraint of a person.

. . . . . .

"(c) A commissioned officer, a warrant officer, or a civilian subject to this chapter or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order such persons into arrest or confinement may not be delegated.

"(d) No person may be ordered into arrest or confinement except for probable cause."

to quarters under arrest differs from that of one who is simply restricted to quarters in lieu of arrest. The distinction depends on whether the accused is relieved of his military duties. He is considered to be restricted under arrest if relieved of his duties, and in lieu of arrest if he is not.[11] Because MacDonald was relieved of his duties, he was restricted to quarters under arrest.

As the government's counsel acknowledged at oral argument, had MacDonald been an enlisted man, he probably would have been confined in a stockade. While his restriction to the bachelor officers' quarters was undoubtedly more comfortable and less confining than imprisonment in a guard house, it was nevertheless a public act that seriously interfered with his liberty. He was relieved of his duties, his phone calls were logged by a military policeman, and he was placed under the surveillance of an escort officer whenever he left his quarters.

The government relies on *Wales v. Whitney,* 114 U.S. 564, 5 S.Ct. 1050, 29 L.Ed. 277 (1885), to support its argument that MacDonald's status was not analogous to that of a civilian who has been arrested. In *Wales,* the Medical Director of the Navy, who had been placed under arrest and restricted to the city of Washington, D.C., pending court-martial, sought a writ of habeas corpus to test the jurisdiction of the military court. The Supreme Court, noting that

11. *See* ¶ 20 *a* and *b,* Manual for Courts-Martial (U.S. 1969 rev. ed.).

Washington was his place of duty, observed that "[i]t is not easy to see how he is under any restraint of his personal liberty, by the order of arrest, which he was not under before." The Court held that the physical restraint of the Medical Director was insufficient as a matter of fact, and the moral restraint imposed by the order was insufficient as a matter of law, to justify issuance of the writ. In reaching this conclusion, the Court pointed out that other procedures allowed the Medical Director to challenge the military court's jurisdiction, and consequently the denial of his petition did not deprive him of an adequate remedy.

We find the government's attempt to equate MacDonald's situation to Wales' unpersuasive. MacDonald's arrest is distinguished from Wales' by the greater limita- [204] tions placed on his liberty. Apart from this, "[n]otions of custody have changed" since 1885, *Strait v. Laird,* 406 U.S. 341, 351, 92 S.Ct. 1693, 32 L.Ed.2d 141 (1972) (Rehnquist, J., dissenting), and *Wales'* custody requirement for a writ of habeas corpus "may no longer be deemed controlling." *Hensley v. Municipal Court,* 411 U.S. 345, 350 n. 8, 93 S.Ct. 1571, 1574, 36 L.Ed.2d 294 (1973).

In any event, the standard employed by the Court in *Wales* to evaluate a restraint of liberty for the procedural requirements of habeas corpus provides an unsatisfactory measure to test the denial of the sixth amendment's guarantee to a speedy trial. The appropriate test is found in *Marion,* not *Wales.* MacDonald was subjected to "actual restraints imposed by arrest and holding to answer a criminal charge." *Marion,* 404 U.S. at 320, 92 S.Ct. at 463.[12]

12. The Assistant United States Attorney for the Eastern District of North Carolina, appearing for the government in the bail hearing before a magistrate for the United States District Court for the Central District of California, described MacDonald's status as follows:

It is these circumstances, as the Court points out, "that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Marion,* 404 U.S. at 320, 92 S.Ct. at 463. We conclude, therefore, that MacDonald's military arrest was the functional equivalent of a civilian arrest allowing him to invoke the sixth amendment's guarantee of a speedy trial.

For the purpose of determining whether the sixth amendment applies, it is immaterial that, although the Army initially accused and arrested MacDonald, the civilian arm of the government is currently prosecuting him.[13] The prosecution of the same charge—murder—that the Army began was pursued by the Department of Justice. The sixth amendment, we hold, secures an accused's rights to a speedy trial against oppressive conduct by the government in its single sovereign capacity, regardless of the number and character of the executive departments that participate in the prosecution.

MacDonald's freedom from detention or bail during the interval between the termination of the Article 32 proceedings and his arrest after indictment did not, from a practical standpoint, dispel the effects of the government's initial accusation. MacDonald, of course, realized that the favorable conclusion of the Article 32 proceedings was not the

> "Back in the Article 32 hearing, he was in custody. He did have an officer with him, assigned to him, as Mr. Segal explained to you. He was, more or less, I believe they call it house arrest at the BOQ. And then, of course, once he was released on the charges, he was no longer required to have another Army officer with him. Shortly after that, he was discharged from the Service."

13. We agree with the government that Fed.R.Crim.P. 48(b) did not control the military proceedings against MacDonald and thus was not applicable to him until his arrest by civilian authorities, *cf. Boeckenhaupt v. United States,* 392 F.2d 24 (4th Cir. 1968).

end of the government's efforts to convict him. Prudence obliged him to retain attorneys at his own expense for his continuing defense.[14] He remained under suspicion and was subjected to the anxiety of the threat of another prosecution.

The absence of imprisonment or bail does not always render inoperative the constitutional guarantee of a speedy trial.[15] [205] In *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), the Court held that the practice of nolle prossing an indictment with leave to reinstate it deprived an accused of his right to a speedy trial even though he was not confined or required to post bail. *Klopfer* differs from this case in one respect: there, an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period. Apart from the absence of an indictment, MacDonald's situation bears a marked resemblance

14. MacDonald alleges that his legal expenses for contesting the Army proceedings against him and for retaining counsel since then amount to $50,000. He estimates that expenses of trial would amount to an additional $250,000.

15. Although the government acknowledges that the Speedy Trial Act of 1974 does not govern this case, it contends that the principles codified in 18 U.S.C. § 3161(h)(6) and its prototype, ABA, *Standards Relating to Speedy Trial* § 2.3(f) (App. draft 1968), should be applied to toll the running of time during the interval from the dismissal of the Army's charges against MacDonald in October 1970 to the return of the indictment in 1975. However, the tolling provision of § 3161(h)(6) must be read in conjunction with the entire Act, which sets fixed time limits after arrest, subject to certain exclusions, within which trial must take place. A single section of the Act should not be used outside of its statutory context as a standard for interpreting the sixth amendment, because the Act does not purport to mark the bounds of the sixth amendment's speedy trial clause. In contrast, *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), which eschews rigid time limits, provides the analysis which we must follow in determining whether the sixth amendment's guarantee has been violated.

to Klopfer's. After formal arrest and charge, both men contested their accusations with the inconclusive result of Klopfer's mistrial and the dismissal of the charges against MacDonald after the Article 32 proceedings. The prosecution against both men, however, could have gone forward promptly—Klopfer's by retrial and MacDonald's by court-martial if the commanding general had rejected Colonel Rock's Article 32 report or if the United States Attorney had presented the case to a grand jury.[16] Nevertheless, neither man was held for trial. Consequently, Klopfer and MacDonald were free from imprisonment or the restraints of bail, but at all times they were subject to prosecution. Unlike defendants held pending trial, Klopfer and MacDonald were deprived of any forum in which to vindicate themselves. Most importantly, under the theory advanced by the state in *Klopfer* and by the federal government here, neither man would be safeguarded by the sixth amendment until the government, at its leisure, renewed the prosecution.

Speaking of the purposes of the sixth amendment's speedy trial provision, the Court said in *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 463 (1971):

> "Inordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense. But the major evils protected against by the speedy trial guarantee exist quite apart from actual or possible prejudice to an accused's defense. To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associa-

16. U.C.M.J. Arts. 18, 32-34, 10 U.S.C. §§ 818, 832-34; ¶¶ 34 and 35 Manual for Courts-Martial (U.S. 1969 rev. ed.); 18 U.S.C. §§ 1111 and 3231.

> tions, subject him to public obloquy, and create anxiety in him, his family and his friends. These considerations were substantial underpinnings for the decision in *Klopfer v. North Carolina* . . . ."

The considerations which the Court recognized as "substantial underpinnings" for affording Klopfer the protection of the sixth amendment apply also, we believe, to MacDonald, whose situation, viewed realistically, was similar to Klopfer's.

The delay between the accusation and detention of MacDonald and his indictment was more than four and one-half years. The Court described a five-year delay as "extraordinary" in *Barker,* 407 U.S. at 533, 92 S.Ct. 2182, and in *United States v. Macino,* 486 F.2d 750 (7th Cir. 1973), a 28-month delay between arrest and indictment was considered excessive. We conclude, therefore, that the delay in MacDonald's case is sufficiently long to justify "inquiry into the other factors that go into the balance" of assessing MacDonald's claim that he has been denied a speedy trial. *Barker,* 407 U.S. at 530, 92 S.Ct. 2182.

The reason for the delay. *Barker* teaches that the weight to be given delay varies with the government's reasons. Deliberate delay to hamper the defense must be weighed heavily against the government, and valid reasons such as a missing witness serve to excuse the delay. Neither of these [206] extremes applies to MacDonald's case, which appears to fall in a middle ground. Speaking of this, the Court said that a "neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." 407 U.S. at 531, 92 S.Ct. at 2192.

There are several identifiable phases of delay and the reasons for them differ. During the initial period, the 1970 Army investigation and Article 32 proceeding, MacDonald was being prosecuted, so the inaction of civilian authorities was justified. For the next 18 months, at the request of the Department of Justice, the CID conducted another extensive investigation. Since the charges had been previously dismissed for insufficient evidence, the civilian prosecutors understandably desired a new investigation before bringing MacDonald to trial. The investigators were not dilatory and the case is complex, so this delay should not be weighed heavily against the government. *See Barker,* 407 U.S. at 531, 92 S.Ct. 2182.

The CID's report, along with its recommendation to prosecute, was transmitted to the Department of Justice in June 1972, more than two years before the commencement of grand jury proceedings. The government has not provided any satisfactory explanation for this two-year hiatus. It suggests that the need for further investigation and for its attorneys to become familiar with the case justifies the delay. But no significant new investigation was undertaken during this period, and none was pursued from August 1973 until the grand jury was convened a year later. Moreover, the United States Attorney was familiar enough with the case to recommend prosecution and specify his need for an additional attorney in the summer or fall of 1973. There is no indication in the record that the delay during this period was "inevitable" because of "[c]rowded dockets, the lack of judges or lawyers," or any other factor which might mitigate the government's failure to bring MacDonald to trial promptly after the CID completed its report in June 1972. *See Dickey v. Florida,* 398 U.S. 30, 38, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970). The leisurely pace from June 1972

until the indictment was returned in January 1975 appears to have been primarily for the government's convenience.[17] The Assistant United States Attorney for the Eastern District of North Carolina, who is familiar with the case, expressed an even harsher assessment of the delay. He told the magistrate at the bail hearing that the tangible evidence had been known to the government since the initial investigation in 1970 but that it had not been fully analyzed by the F.B.I. until the latter part of 1974. He explained that the F.B.I. analysis was tardy "because of government bureaucracy."[18] Whether one attributes the delay [207]

17. The government may have proceeded on the erroneous assumption that no matter how much time elapsed between prosecutions, the pre-indictment delay would be of no consequence. But a mistake of law affords no justification for depriving an accused of sixth amendment rights. *Dickey v. Florida,* 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970).

18. During the course of the government's summation at the bail hearing, the Assistant United States Attorney and the Magistrate engaged in the following colloquy:

ASSISTANT UNITED STATES ATTORNEY: Your Honor, there is, I am sure, some question about the five-year period of time in here. This case has been investigated over a five-year period of time. It was not until very recently that the FBI Laboratory came into the case. Previously, the investigation of the case from a scientific viewpoint was by the Army CID Lab.

At the time of the Article 32 hearing in 1970 when Dr. MacDonald was released from the Army charges, much of the scientific evidence that I've made available to you today was not available to the hearing officer at that time.

THE MAGISTRATE: But this evidence has been gone over—this evidence is four or five years old now . . .

ASSISTANT UNITED STATES ATTORNEY: Yes. The evidence with regard to the pajama top, the bath mat and the sheet: All that evidence has been produced within the last five months by the FBI Lab.

THE MAGISTRATE: But that evidence—the analysis of that evidence was within the last five months, is that correct?

ASSISTANT UNITED STATES ATTORNEY: Yes, sir. The evidence was in existence the whole time: The bloody sheet, the bath mat and the—

THE MAGISTRATE: The time—three to four years passed between the creation of the evidence and its analysis?

from mid-1972, when the CID recommended prosecution, until the indictment was returned in January 1975 to indifference, negligence, or ineptitude, it must be weighed against the government. *Barker,* 407 U.S. at 514, 92 S.Ct. 2182; *Dickey v. Florida,* 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed. 2d 26 (1970). We turn, therefore, to the third factor prescribed by *Barker,* an appraisal of MacDonald's conduct.

The defendant's assertion of his right. In *Barker* the Supreme Court observed that some defendants may wish to delay trial in expectation of the prosecution's case becoming stale. 407 U.S. at 521, 92 S.Ct. 2182. At the same time, it rejected a strict "demand-waiver" approach that requires a defendant to assert the right or lose it. 407 U.S. at 524-29, 92 S.Ct. 2182. It recognized, however, that an important factor in deciding a claim that a defendant has been denied a speedy trial is whether he wanted one and made his demands known to the prosecution. 407 U.S. at 531-32, 92 S.Ct. 2182.

MacDonald has by no means delayed the prosecution of his case. While he was in the Army, and afterwards, he gave statements to the CID. He testified under cross-examination in the Article 32 hearing and offered to submit himself to questioning by attorneys in the Department of Justice. Additionally, he waived immunity and testified before the grand jury.

MacDonald also has consistently expressed a desire to have the case resolved. He first attempted to expedite a

ASSISTANT UNITED STATES ATTORNEY: That's correct.

THE MAGISTRATE: Very well.

ASSISTANT UNITED STATES ATTORNEY: We were not —Because the FBI Lab, because of Government bureaucracy, did not come into the case, and we were unable to get them into the case until the beginning of this Grand Jury.

Prior to that time, the Army CID Lab out of Fort Gordon handled it, and they do not have the sophistication that the FBI Lab has, and they will admit that.

decision in January 1972. Later, his attorneys wrote the department several letters inquiring about a final decision on the prosecution to relieve "the unfounded suspicion" to which MacDonald was subjected.[19] A person in his position who has been arrested but not indicted is under no compulsion to demand prosecution in order to preserve his right to a speedy trial, for the primary responsibility for bringing cases to trial rests on the government. *United States v. Macino,* 486 F.2d 750 (7th Cir. 1973); *cf. Barker,* 407 U.S. at 529, 92 S.Ct. 2182. Both the facts and the law, therefore, warrant the conclusion that MacDonald reasonably asserted his right to a speedy trial. In accordance with *Barker,* his assertion "is entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." 407 U.S. at 531-32, 92 S.Ct. 2182, 2192.

Prejudice to the defendant. An affirmative demonstration of prejudice is unnecessary to prove a denial of the right to a speedy trial. It is, however, one of the factors a court must weigh in adjudicating the accused's claim. *Moore v. Arizona,* 414 U.S. 25, 94 S.Ct. 188, 38 L.Ed.2d 183 (1973); *Barker,* 407 U.S. at 533, 92 S.Ct. 2182. The Court has said the sixth amendment's guarantee of a speedy trial is "an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." *United States v. Ewell,* 383 U.S. 116, 120, 86 S.Ct. 773, 776, 15 L.Ed.2d 627 (1966). Prejudice, therefore, should be assessed in the light of these interests. *Barker,* 407 U.S. at 532, 92 S.Ct. 2182.

MacDonald was not imprisoned or subject to bail from October 1970 until January 1975, but his freedom to come

19. Extracts from some of the letters are quoted in notes 5 and 6 *supra.*

and go is not decisive. An accused person who [208] is not restrained may nonetheless be prejudiced. *Klopfer v. North Carolina,* 386 U.S 213, 221, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967). MacDonald has had to live with the constant threat of a new prosecution. He has been required to retain counsel at his own expense, and he has suffered anxiety concerning the unresolved nature of the case. These personal concerns are significant elements of prejudice. *United States v. Marion,* 404 U.S. 307, 320, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

Also, MacDonald's claim that his ability to defend himself has been impaired is not unfounded. Most of his witnesses who were in the Army in 1970 have scattered across the country. Even if the government provides the defense with current addresses, interviewing these witnesses before trial and insuring their presence at trial would be time-consuming and expensive. Moreover, in the five years since the murders, memories have faded and witnesses can no longer be expected to reliably recall details.

Such potential memory loss is critical in this case, since a detailed reconstruction of the murder scene is an element of the government's case. The position of a flowerpot, the way MacDonald's pajama top was folded, the condition of the sheets in the bedroom, are but examples of the many questions about physical evidence that the government's case turns on. In one instance, the government contended at the Article 32 hearing that an overturned coffee table lying on its side showed that the murder scene was staged, since the table was top-heavy and would have turned completely over if kicked in a scuffle. When the Article 32 officer visited the scene and kicked the table over, however, it struck a chair and landed on its side. Thus, the exact position of the chair is important in determining whether MacDonald staged the murders as the government charges.

The prosecution emphasizes that all of the testimony at the Article 32 hearing and the statements made to investigators since then have been kept and may be used to refresh memories. Yet this in itself illustrates the prejudice to MacDonald. A stale witness, forced to rely on statements made half a decade previously, cannot be as effective as one actually remembering what he saw. Since the details of any witness's testimony may change over five years, the adverse inference a jury might draw from the government's use of its old records to impeach defense witnesses cannot be overlooked.

In sum, applying the principles of *United States v. Marion,* 404 U.S. 307, 320-21, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971), we conclude that for the purposes of determining whether MacDonald was denied his right to a speedy trial, the Army's formal accusation and detention on May 1, 1970, entitled him to invoke the protection of the sixth amendment. *See Dillingham v. United States,* 423 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975). Weighing the factors specified by *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), we believe that the delay—even if the period from May 1, 1970, to June 30, 1972, is wholly excluded as excusable—was of sufficient length to be "presumptively prejudicial." 407 U.S. at 530, 92 S.Ct. 2182. The delay, therefore, necessitates inquiry into the other factors of the balance. The government has furnished no satisfactory explanation for the delay from the end of June 1972 until the grand jury was convened in August 1974, so this time must be weighed against it. MacDonald, on the other hand, neither contributed to this delay nor acquiesced in it, so his conduct weighs heavily in his favor. Finally, it is apparent from the record that MacDonald has been prejudiced by the formal accusation and arrest of May 1970, by anxiety arising out

of the delayed resolution of this charge, and by the impediment to his defense that scattered witnesses and dimmed memories inevitably cause. Weighing all of these factors, we conclude that the government has denied MacDonald a speedy trial as guaranteed by the sixth amendment and that the prosecution must be dismissed. *Strunk v. United States,* 412 U.S. 434, 93 S.Ct. 2260, 37 L.Ed.2d 56 (1973).

[209] IV

We find no error in the district court's rulings concerning the composition of the grand jury, alleged prosecutorial misconduct, and the denial of motions for discovery and suppression of evidence.

MacDonald claims that General Flanagan's acceptance of his exoneration in the Article 32 hearing collaterally estops the government from prosecuting him again. Alternatively, he argues that the second prosecution places him in double jeopardy. The government argues, however, that the Article 32 proceedings did not place MacDonald in jeopardy since only a court-martial, which was never convened, could have convicted him. Decision of this aspect of the case depends largely on the legal effect of the acceptance of an Article 32 recommendation by the commanding officer. It appears that custom imputes finality to the commanding officer's decision. This would arguably sustain a plea of collateral estoppel, if not double jeopardy, but no military regulation or case specifically deals with this question. In view of the unsettled state of this point of military law and of our disposition of the case under the speedy trial provision of the sixth amendment, we find it unnecessary and imprudent to render an opinion, which would in effect be advisory, on an issue of general importance to military law.

The case is remanded with directions to dismiss the prosecution with prejudice because of the government's failure

to accord MacDonald a speedy trial as required by the sixth amendment.

CRAVEN, Circuit Judge (dissenting):

My brothers hold that the sixth amendment compels the dismissal of the *only* prosecution ever begun against Dr. MacDonald. One need know very little about military law to understand that a charge of homicide can be disposed of finally only by court-martial. None was ever convened. Instead, the Army, pursuant to Article 32, Uniform Code of Military Justice,[1] simply conducted a "thorough and impartial investigation" to determine whether the charge might be referred to a general court-martial, and concluded that the evidence was insufficient to justify the convening of a general court. It is true that the hearing was protracted and made newspaper headlines. But it is also true, it seems to me (my brothers do not reach the question), that Captain MacDonald has never been put to trial by either a civil or military court. What happened to him in the Army is the substantial equivalent of an open grand jury proceeding resulting in the failure to return a true bill, and that is all.[2]

1. 10 U.S.C. § 832.

2. My brothers premise their analysis on an application of a civilian court of the sixth amendment speedy trial guarantee to events which occurred while MacDonald was in the military.

That the sixth amendment's speedy trial guarantee applies to the military is an appealing assumption but should be recognized as such. The criminal trial provisions of both the fifth and sixth amendments are clearly aimed at procedure in the civil courts. The fifth expressly excludes cases arising in the land or naval forces from prosecutions requiring grand jury indictment, and it is settled that neither the fifth nor sixth amendments can "be taken to have extended the right to demand a jury to trials by military commission . . . ." *Ex Parte Quirin*, 317 U.S. 1, 40, 63 S.Ct. 1, 17, 87 L.Ed. 3 (1942). It is true that the Supreme Court once assumed the application of the double jeopardy clause of the fifth amendment in a military context, but in doing so it is significant that it denied relief. *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949). I think my brothers' decision would rest on firmer ground if it were pitched on the fundamental fairness doctrine implicit in the due process clause, which has been applied time and again to an infinite variety of matters not restricted to criminal procedure in the civilian courts, as is, I think, the sixth amendment right to speedy trial. *See generally, O'Callahan v. Parker*, 395 U.S. 258, 272-73, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969); *Kinsella v. Krueger*, 351 U.S. 470, 474, 76 S.Ct. 886, 100 L.Ed. 1342 (1956); *Duncan v. Kahanamoka*, 327 U.S. 304, 309, 66 S.Ct. 606, 90 L.Ed. 688 (1946); *Burns v. Lovett*, 91 U.S. App.D.C. 208, 202 F.2d 335, 341-42 (1952), *aff'd sub nom., Burns v. Wilson*, 346 U.S. 137, 73 S.Ct. 1045, 97 L.Ed. 1508 (1953).

My brothers hold that the sixth amendment's guarantee of the right to a speedy trial as interpreted by the Supreme Court [210] in *Marion*,[3] *Barker*,[4] and *Dillingham*,[5] is triggered by the Army proceedings. I think not and respectfully dissent.

I.

In *Marion* the Supreme Court defined the point at which the sixth amendment becomes applicable:

> On its face, the protection of the Amendment is activated only when a criminal prosecution has begun and extends only to those persons who have been *"accused"* in the course of that prosecution. These provisions would seem to afford no protection to those not yet accused, nor would they seem to require the Government to discover, investigate, and accuse any person within any particular period of time.

404 U.S. at 313, 92 S.Ct. at 459 (emphasis added).

It is now settled that a civilian becomes an "accused" when he is arrested and charged with a crime. This is so, the Supreme Court tells us, because:

3. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971).

4. *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).

5. *Dillingham v. United States*, 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (U.S., Dec. 1, 1975).

> To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime. Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.

Marion, supra at 320, 92 S.Ct. at 463. *See Dillingham v. United States,* 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205 (1975) (quoting *Marion*).

Thus, "it is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *Dillingham, supra; Marion, supra.*

It is significant to me that the Court equates "either a formal indictment . . . or else the actual restraints imposed by arrest . . . to answer a criminal charge . . . ." It does *not* suggest that the amendment is triggered when the prosecutor presents the bill to the grand jury. Instead, the period of time for measuring the speed of the trial runs from the return of a true bill into the court. Charge is not enough. At most, Dr. MacDonald was "charged." Also, under the specific language of *Marion,* I do not believe the sixth amendment's speedy trial guarantee would be brought into play by an arrest without warrant by a federal drug enforcement officer, for example, if, upon presentation to a magistrate, the arrestee were released because no probable cause was shown. I do not believe my brothers would contend otherwise.[6]

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6. I note that Dillingham was arrested on a warrant. *United States v. Palmer,* 502 F.2d 1233, 1234 (5th Cir. 1974), *rev'd sub nom. Dillingham v. United States,* 403 U.S. 64, 96 S.Ct. 303, 46 L.Ed.2d 205, 44 U.S.L.W. 3327 (1975).

My analysis of the facts of this case is that the procedure in which MacDonald was involved falls somewhere between an unsuccessful presentation to a grand jury and an arrest and subsequent release because of a failure to demonstrate probable cause for the arrest. Neither, I believe, warrants an application of the sixth amendment's speedy trial guarantee.[7]

MacDonald was charged with the murder of his wife and children by Colonel Francis Kane, his immediate commander. These charges were preferred under Article 30 [211] U.C.M.J.[8] That article makes clear that a finding of "probable cause" is not required to "charge" an individual under the Code.[9] Indeed, anyone subject to the U.C.M.J. can prefer charges against anyone else who is also under the Code.[10] A determination of probable cause, or its "functional equivalent," is only made under military procedure at the Article 32 proceedings.[11]

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7. This case differs from both my examples in that during these proceedings MacDonald was neither as free from restraints as a person under grand jury investigation nor as restricted as someone under civilian arrest. *See* part II, *infra.*

8. 10 U.S.C. § 830.

9. Article 30 reads as follows:

> (a) Charges and specifications shall be signed by a person subject to this chapter under oath before a commissioned officer of the armed forces authorized to administer oaths and shall state—
>
> (1) that the signer has personal knowledge of, or has investigated, the matters set forth therein; and
>
> (2) that they are true in fact to the best of his knowledge and belief.
>
> (b) Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made thereof in the interest of justice and discipline, and the person accused shall be informed of the charges against him as soon as practicable.

10. ¶ 29b, Manual for Courts-Martial (U.S. 1969 rev. ed.).

11. Article 32, 10 U.S.C. § 832 reads in relevant part:

> (a) No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investi-

In MacDonald's case, at the close of the Article 32 proceedings Major General Edward M. Flanagan, Jr., acting on the report of Colonel Warren V. Rock, who presided at those proceedings, dismissed the charges because "[i]n [his] opinion, there [was] insufficient evidence available to justify reference of the charges to trial by court-martial."

It is therefore clear that no finding of probable cause was made in Dr. MacDonald's case at the Article 32 proceedings. My brothers are of the view, however, that we should presume such a finding was made because it should have been made prior to "arrest" under 10 U.S.C. § 810.

Whether a finding of probable cause was made is a question of fact. If there were such a finding I should think it would be supported by the record, but the majority makes no reference to any orders, either written or oral, to indicate that a finding of probable cause was made. We are not told when the finding was made, who made it, or what procedures he followed in doing so. Instead, as I have said, a presumption is created.

First, my brothers reason that since MacDonald was relieved of his duties, his status must be that of "arrest" rather than "restriction to quarters in lieu of arrest." Secondly, they correctly note that under 10 U.S.C. § 810 MacDonald was subject to arrest or confinement when charged with the murders by Colonel Kane on May 1. And finally, they infer that since 10 U.S.C. § 809 purports to require that

gation of all the matters set forth therein has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation as to the disposition which should be made of the case in the interest of justice and discipline.

all arrests be supported by probable cause that probable cause must have been found in MacDonald's case.

I do not believe it is necessarily the case that because MacDonald was relieved of his duties, he was arrested. I read Paragraphs 20a and b of the Manual for Courts-Martial only to say that an officer under "arrest" may not be required to perform his duties and that an officer restricted to quarters in lieu of arrest may be required to do so. These two provisions do not forbid the Army from relieving one restricted to his quarters of any or all of his duties. That MacDonald was relieved of all duties is not, I believe, conclusive as to this status.

I agree with my brothers, as I have previously said, that MacDonald was subject to arrest or confinement under 10 U.S.C. § 810 when charged with homicide. But I cannot agree that the power to do a thing requires a finding that it was done. Whatever the logic of such a presumption, I believe Paragraph 18b of the Manual of Courts-Martial destroys it for that paragraph explicitly states that the arrest and confinement pro- [212] visions, although couched in terms of requirements, are "not mandatory and [their] exercise rests within the discretion of the person vested with the power to arrest or confine."[12]

I think the Manual of Courts-Martial will take us just so far and that we are driven back to the facts, and the facts are that Dr. MacDonald was verbally restricted to quarters

12. b. Basic consideration. (1) Any person subject to the code accused of an offense under the code shall be ordered into arrest or confinement, as circumstances may require; but when accused only of an offense normally tried by a summary court-martial, he shall not ordinarily be placed in confinement (Art. 10). The foregoing provision is not mandatory and its exercise rests within the discretion of the person vested with the power to arrest or confine. No restraint need be imposed in cases involving minor offenses. A failure to restrain does not affect the jurisdiction of the court.

by Colonel Kane on April 6, 1970, and there is nothing whatsoever in the record to suggest any change in his status when he was formally charged on May 1. If MacDonald was ever arrested it must have been on April 6 when he was first restricted to quarters and his duties lifted, and on that date I do not believe that anyone suggests the existence of probable cause for arrest, let alone a specific finding to that effect.[13]

My brothers and I agree, I think, that arrest without more is not enough to trigger the sixth amendment. There must be a lawful arrest, *i.e.,* with probable cause. It is fair to say, I think, that there is not one word in the record to even suggest that anyone, much less the equivalent of an impartial magistrate, ever purported to find probable cause to arrest Dr. MacDonald. I believe we can be fairly sure that this is the first instance in the long history of the doctrine of probable cause in which a court has assumed that there must have been such a finding because it should have been made.

Finally, I cannot agree with my brothers that Colonel Kane's charge was the functional equivalent of a civilian arrest warrant. I am not sure to what it should be equated, but it is equally plausible to view it as the functional equivalent of the complaint of the prosecutor who then must seek an arrest warrant from an impartial magistrate.

Based on the above analysis I believe it is clear that a finding of probable cause was *never* made in Dr. MacDonald's case. Unless we ignore as surplusage the Supreme Court's language in *Marion,* which it repeated in *Dillingham,* that to "arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime," I do not understand how this case can be fitted within the rule of law established by those cases. Furthermore, I do not believe that the policy underpinnings of *Marion* allow us to ignore the significance of a finding of probable cause. The Supreme Court concentrated on the impact of the public act of arrest on the defendant. I believe that fundamental to that impact is the fact that, in the civilian arrest context with which *Marion* was concerned, an arrest must be supported by probable cause. With reference to public obloquy, contrast instead, what happened to Dr. MacDonald: after the equivalent of the return of "not a true bill," he was honorably discharged. I, therefore, think that Dr. MacDonald's case is clearly distinguishable from any of the cases cited by the majority.

13. All the majority tells us about that event is that on April 6 the CID informed MacDonald that "he was under suspicion." At 200. I find nothing in their treatment of this encounter nor anything in the record to indicate that on that day probable cause was found.

My brothers find this case to closely parallel *Klopfer v. North Carolina,* 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967), differing from it in only one respect: "there an indictment remained potentially effective during the period of delay; here, MacDonald was not indicted until the end of the period."[14] I agree that that is the major difference between the cases, but I find the distinction to constitute the centerpiece of the Supreme Court's holding in that case [213] that Klopfer's sixth amendment rights had been violated.

> The pendency of the indictment may subject him to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes. By indefinitely prolonging this oppression, as well as the "*anxiety and concern accompanying public accusation,*" the criminal procedure condoned in this case by

14. At 205.

> the Supreme Court of North Carolina clearly denied the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States.

386 U.S. at 222, 87 S.Ct. at 993 (footnote omitted and emphasis added).

During this four-year period MacDonald stood under no "public accusation." The charges had been dismissed by the Army, and this action was made irrevocable by his discharge from the Army. I find this claim therefore to be one of double jeopardy, which I do not believe is meritorious, and which issue my brothers do not reach.

II.

Under my brothers' reasoning, we must determine that military arrest is the functional equivalent of civilian arrest for the purposes of triggering the right to a speedy trial. I conclude that MacDonald was never "arrested" in the sense required under *Marion*.

MacDonald was restricted to his room in the Bachelor Officers' Quarters.[15] An armed MP was placed outside his door. An escort officer accompanied him when he left the quarters.[16] While *Wales v. Whitney*, 114 U.S. 564, 5 S.Ct.

15. The majority opinion attaches significance to the fact that had MacDonald been an enlisted man he would have probably been confined in the stockade. At 203. The fact is that he was an officer and was not so confined.

16. The government describes MacDonald's restrictions as follows:

> He was to remain in his room except when he was visiting his lawyers, dining at the officers club, or making parachute jumps for pay qualification purposes. The general, though unenforced, limitation on Captain MacDonald's movement was the requirement that he be accompanied by an escort officer while on post. He was permitted to sun bathe in the vicinity of the BOQ, to play golf on post, to attend the post chapel as well as the post theatre, post liquor (Class VI) store, commissary, post exchange and the bowling alley.

Brief for Appellee at 5-6.

In the context of the military where a person is subject normally to the orders of his superiors, I do not find this the type of serious "interfere[nce] with his liberty" which I believe brings the right to speedy trial into play.

17. At 203-204.

1050, 29 L.Ed. 277 (1885) is, as my brothers say, no longer the law as to the degree of "confinement" necessary to support issuance of a writ of habeas corpus, I believe it is fully applicable to the majority's search for the functional equivalent of a civilian arrest. In that respect, I believe it is still sound precedent and demands a conclusion that MacDonald was not in a civilian sense under the "actual restraints required by arrest and holding to answer to a criminal charge."

In *Wales* a Navy officer who had been ordered to appear for trial at general court-martial was given the following order by the Secretary of the Navy: "You are hereby placed under arrest, and you will confine yourself to the limits of the City of Washington." 114 U.S. at 566, 5 S.Ct. at 1051. While the majority may be correct that the cases differ with respect to "the greater limitations placed on [MacDonald's] liberty,"[17] I believe, like those in *Wales*, the restraints imposed on MacDonald did not constitute "actual confinement or the present means of enforcing it." 114 U.S. at 572, 5 S.Ct. at 1053. The restraints were, under the Supreme Court's terminology, simply "moral." As I read *Wales*, the critical point was not that the petitioner in that case was free to walk the streets of Washington, D. C., alone. The Supreme Court focused on the fact that if he had

wished to leave the District, he was free to do so, "[a]nd though it is said that a file of marines or some proper officer could have been sent to arrest, and bring him back, this [214] could only be done by another order of the secretary, and would be another arrest, and a real imprisonment under another distinct order." 114 U.S. at 572, 5 S.Ct. at 1054.

Neither side has provided this court with the orders directed to MacDonald or others concerning his restriction to quarters. At oral argument, however, we were told by the government attorney arguing the case that the MP stationed outside MacDonald's door was given specific instructions *NOT* to stop him if he tried to leave. The escort officer who accompanied MacDonald, according to my understanding of the facts, was not armed. I find nothing in the record to indicate that his orders included a direction to stop MacDonald from any conduct he undertook. I therefore find the present case indistinguishable from *Wales*. Any actual confinement would have required an additional order, and there was therefore no "actual confinement or the present means of enforcing it." *Wales, supra* at 572, 5 S.Ct. at 1053.

III.

Having concluded that the sixth amendment's guarantee of speedy trial does not apply in MacDonald's case, he may still prevail if it were found that the delay violated his right to due process under the fifth amendment. *See, e. g., Marion, supra*, 404 U.S. at 324, 92 S.Ct. 455; *Ross v. United States*, 121 U.S.App.D.C. 233, 349 F.2d 210 (1965). But to grant relief under the fifth amendment requires a showing of substantial prejudice, and I find none. *Id.*

The majority finds prejudice in the fact that MacDonald's witnesses, as Army personnel, have scattered around the world with resulting difficulty in locating them and conducting pretrial interviews. In addition, my brothers agree with MacDonald's argument that the memories of these witnesses will be dulled by time. But all that is speculative. In a wholly circumstantial type of case, it is improbable that guilt or innocence will turn upon accurate recollection of the facts. It is not suggested that any defense witness who knows the truth now cannot be produced, or if found, cannot now remember what he once knew.

But if it be assumed that these factors may supply the requisite prejudice under the sixth amendment's more specific guarantees, I do not believe they require dismissal of the indictment under the fifth amendment's guarantee of due process. Certainly that question need not be anticipated, and could best be left for determination at trial.

I would affirm.

United States Court of Appeals
for the Fourth Circuit

No. 75-1870
No. 75-1871

United States of America,
Appellee,

-v-

Jeffrey R. MacDonald,
Appellant.

On Remand from the United States Supreme Court

Submitted October 12, 1978 Decided October 27, 1978

Before HAYNSWORTH, Chief Judge,
and BUTZNER and RUSSELL,
Circuit Judges.

BUTZNER, Circuit Judge:

In United States v. MacDonald, 98 S.Ct. 1547 (1978), the Supreme Court held that a defendant may not obtain interlocutory appellate review of an order denying his pretrial motion to dismiss an indictment because of alleged infringement of his sixth amendment right to speedy trial.* On remand, we granted Jeffrey R. MacDonald's motion for supplemental briefing on the issue of double jeopardy.

We conclude that the proceeding against MacDonald under Article 32, U.S.C.M.J., 10 U.S.C. § 832, and the commanding officer's review were investigative. Although this investigation culminated in the acceptance of a recommendation that charges against MacDonald be dismissed because they were "not true," the proceeding did not adjudicate his guilt or innocence. Calley v. Callaway, 519 F.2d 184, 215 n.54 (5th Cir. 1975); United States v. Moffett, 10 U.S.C.M.A. 169, 27 C.M.R. 243 (1959); United States v. Zagar, 5 U.S.C.M.A. 410, 416-17, 18 C.M.R. 34, 40-41 (1955).

*The Court reversed United States v. MacDonald, 531 F.2d 196 (4th Cir. 1976). The facts and issues are set forth sufficiently in both opinions.

Since MacDonald was not put to trial before a military tribunal authorized to convict or acquit him, jeopardy never attached. Serfass v. United States, 420 U.S. 377, 387-89 (1975). Consequently, the fifth amendment's guarantee against double jeopardy does not bar subsequent prosecution in a federal district court. *See* Crist v. Bretz, 98 S.Ct. 2156, 2159 (1978). Furthermore, because no final judgment of a tribunal having jurisdiction to try MacDonald has determined an issue of ultimate fact, the prosecution pending in the district court is not barred by the fifth amendment's embodiment of collateral estoppel. *See* Ashe v. Swenson, 397 U.S. 436, 443 (1970). The absence of such a judgment distinguishes this case from United States v. Oppenheimer, 242 U.S. 85 (1916) and United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), on which MacDonald primarily relies.

The order denying MacDonald's plea of double jeopardy is affirmed, and this case is remanded to the district court for further proceedings.

United States Court of Appeals
for the Fourth Circuit

No. 75-1870

United States of America,
Appellee,

versus

Jeffrey R. MacDonald,
Appellant.

No. 75-1871

United States of America,
Appellee,

versus

Jeffrey R. MacDonald,
Appellant.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc, IT IS ADJUDGED and ORDERED that the petition for rehearing is denied.

Upon consideration of a motion of the appellant, for stay of mandate pending application to the United States Supreme Court for a writ of Certiorari, IT IS ORDERED that the motion is DENIED.

Entered at the direction of Judge Butzner, for a panel consisting of Judge Haynsworth, Judge Butzner, and Judge Russell.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk

Filed Nov 24 1978
U. S. Court of Appeals
Fourth Circuit

Army Regulations AR 27-10, *Military Justice,* November 26, 1968, Ch. 7.

PERTINENT EXTRACTS FROM MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENTS OF JUSTICE AND DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CRIMES OVER WHICH THE TWO DEPARTMENTS HAVE CONCURRENT JURISDICTION, DATED 19 JULY 1955

It is hereby agreed and understood between the Department of Justice and the Department of Defense as follows:

1. *Crimes committed on military installations.* Except as hereinafter indicated, all crimes committed on a military installation by individuals subject to the Uniform Code of Military Justice shall be investigated and prosecuted by the military department concerned if such department makes a determination that there is a reasonable likelihood that only individuals subject to the Uniform Code of Military Justice are involved in such crime as principals or accessories, and, except in extraordinary cases, that there is no victim other than persons who are subject to the Uniform Code of Military Justice or who are *bona fide* dependents or members of a household of military or civilian personnel residing on the installation. Unless such a determination is made, the military department concerned shall promptly advise the Federal Bureau of Investigation of any crime committed on a military installation if such crime is within the investigative authority of the FBI. The FBI shall investigate any serious crime of which it has been so advised for the purpose of prosecution in the civil courts unless the Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by the military department concerned. Even if the determination provided for in the first sentence of this par-

agraph is made by the military department concerned, it shall promptly advise the FBI of any crime committed on a military installation in which there is a victim who is not subject to the Uniform Code of Military Justice or a *bona fide* dependent or member of the household of military or civilian personnel residing on the installation and that such department is investigating the crime because it has been determined to be extraordinary. The military department concerned shall promptly advise the Federal Bureau of Investigation whenever the crime, except in minor offenses, involves fraud against the government, misappropriation, robbery, or theft of government property or funds, or is of a similar nature. All such crimes shall be investigated by the military department concerned unless it receives prompt advice that the Department of Justice has determined that the crime should be investigated by the FBI and that the FBI will undertake the investigation for the purpose of prosecution in the civil courts.

2. *Crimes committed outside of military installations.* Except as hereinafter indicated, all crimes committed outside of military installations, which fall within the investigative jurisdiction of the FBI and in which there is involved as a suspect an individual subject to the Uniform Code of Military Justice, shall be investigated by the FBI for the purpose of prosecution in civil courts, unless the Department of Justice determines that investigation and prosecution may be conducted more efficiently and expeditiously by other authorities. All such crimes which come first to the attention of military authorities shall be referred promptly by them to the FBI, unless relieved of this requirement by the FBI as to particular types or classes of crimes. However, whenever military personnel are engaged

in scheduled military activities outside of military installations such as organized maneuvers or organized movements, the provisions of paragraph 1 above shall apply unless persons not subject to the Uniform Code of Military Justice are involved as principals, accessories or victims.

If, however, there is involved as a suspect or as an accused in any crime committed outside of a military installation and falling within the investigative authority of the FBI an individual who is subject to the Uniform Code of Military Justice and if the military authorities believe that the crime involves special factors relating to the administration and discipline of the armed forces which would justify investigation by them for the purpose of prosecution before a military tribunal, they shall promptly advise the FBI of the crime and indicate their views on the matter. Investigation of such a crime may be undertaken by the military authorities if the Department of Justice agrees.

3. *Transfer of investigative authority.* An investigative body which has initiated an investigation pursuant to paragraphs 1 and 2 hereof shall have exclusive investigative authority and may proceed therewith to prosecution. If, however, any investigative body comes to the view that effectuation of those paragraphs requires the transfer of investigative authority over a crime, investigation of which has already been initiated by that or by any other investigative body, it shall promptly advise the other interested investigative body of its views. By agreement between the Departments of Justice and Defense, investigative authority may then be transferred.

4. *Administrative action.* Exercise of exclusive investigative authority by the FBI pursuant to this agreement shall not preclude the military authorities from making inquiries for the purpose of administrative action related

to the crime being investigated. The FBI will make the results of its investigations available to the military authorities for use in connection with such action.

Whenever possible, decisions with respect to the application in particular cases of the provisions of this Memorandum of Understanding will be made at the local level, that is, between the Special Agent in charge of the local office of the Federal Bureau of Investigation and the local military commander.

5. *Surrender of suspects.* To the extent of the legal authority conferred upon them, the Department of Justice and the military authorities will each deliver to the other promptly suspects and accused individuals if authority to investigate the crimes in which such accused individuals and suspects are involved is lodged in the other paragraphs 1 and 2 hereof.

Nothing in this memorandum shall prevent a military department from prompt arrest and detention of any person subject to the Uniform Code of Military Justice whenever there is knowledge or reasonable basis to believe that such a person has committed an offense in violation of such code and detaining such person until he is delivered to the Federal Bureau of Investigation if such action is required pursuant to this memorandum.

No. 78-1156

In the Supreme Court of the United States

OCTOBER TERM, 1978

JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

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JEFFREY R. MACDONALD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals upon remand from this Court (Pet. App. 42-43) is reported at 585 F. 2d 1211. The initial opinion of the court of appeals (Pet. App. 7-41) is reported at 531 F. 2d 196. The opinion of the district court (Pet. App. 1-6) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1978, and a petition for rehearing was denied on November 24, 1978 (Pet. App. 44). On December 15, 1978, the Chief Justice granted an extension of time to and including January 23, 1979, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an indictment charging petitioner with the murder of his family is barred on grounds of double jeopardy because of a prior military investigation conducted pursuant to Article 32 of the Uniform Code of Military Justice.

STATEMENT

In *United States* v. *MacDonald,* 435 U.S. 850 (1978), this Court ruled that petitioner could not, before trial, appeal an order denying his motion to dismiss an indictment because of an alleged violation of the right to a speedy trial. The case was remanded for further proceedings, including consideration of petitioner's pre-trial appeal of the order refusing to dismiss his indictment on double jeopardy grounds. See *Abney* v. *United States,* 431 U.S. 651 (1977). On October 27, 1978, after granting petitioner's motion for rebriefing on the issue of double jeopardy, the court of appeals rejected petitioner's double jeopardy claim and remanded the case to the district court for trial (Pet. App. 42-43).

The facts are described in this Court's opinion (435 U.S. at 851-852) and in the initial opinion of the court of appeals (Pet. App. 9-14). Briefly, petitioner, then a Captain in the Army Medical Corps assigned to the "Green Berets" at Fort Bragg, North Carolina, telephoned the military police in the early morning of February 17, 1970, seeking assistance. The police rushed to petitioner's quarters and found that petitioner's wife and two young daughters had been brutally murdered. Petitioner told the officers that the family had been attacked by four unknown "hippies." The Army's Criminal Investigation Detachment, the Federal Bureau of Investigation, and local police began an immediate investigation of the crime, the results of which led them to question petitioner's story concerning the assailants. On April 6, 1970, petitioner was informed that he was a suspect and was relieved of his medical duties.

On May 1, 1970, pursuant to Article 30 of the Uniform Code of Military Justice (U.C.M.J.), 10 U.S.C. 830, petitioner's commanding officer formally charged him with the murders. As required by Article 32 of the U.C.M.J., 10 U.S.C. 832, an investigating officer, Colonel Warren V. Rock, was appointed to investigate the matter and to recommend to the General Court-Martial Convening Authority (the post commander) whether the murder charges should be referred to a general court-martial for trial.

After completing his investigation, Colonel Rock recommended that the charges against petitioner be dismissed but that the civilian authorities investigate a named female suspect. On October 23, 1970, the commanding general of petitioner's unit accepted the recommendation and dismissed the charges, citing insufficient evidence to refer the case to a general court-martial. In December 1970, the Army granted petitioner an honorable discharge for reasons of hardship.

Following petitioner's discharge from the military, the CID continued the investigation of the crimes at the request of the Department of Justice. This investigation led to the production of a 13-volume report in June 1972 and supplemental reports in November 1972 and August 1973. These reports contained substantial scientific and other evidence casting serious doubts upon the veracity of petitioner's version of the events at his residence at the time of the slayings. On January 24, 1975, a grand jury of the United States District Court for the Eastern District of North Carolina returned an indictment charging petitioner with three counts of first-degree murder, in violation of 18 U.S.C. 1111.

Petitioner challenged the indictment on a number of grounds, including double jeopardy, pre-indictment delay, and denial of a speedy trial. The district court denied petitioner's motions (Pet. App. 1-6). Petitioner took an

immediate appeal, and the court of appeals reversed on the basis of denial of a speedy trial (*id.* at 7-41). This Court then reversed the court of appeals' judgment, holding that the court below lacked jurisdiction to consider the appeal of the speedy trial claim prior to trial.[1]

ARGUMENT

Petitioner's claim that the district court erred in holding that his prosecution for murder was not barred by the Double Jeopardy Clause was properly rejected by the court of appeals.[2] Moreover, as petitioner concedes (Pet. 15 n.14), the court's decision "appears to be the first one ruling on this issue," which depends largely upon an interpretation of military law. In these circumstances, this case does not warrant further review.

1. Petitioner's double jeopardy argument is grounded on the assertion that the Army's preliminary investigation, conducted pursuant to Article 32 of the U.C.M.J., was a proceeding that placed him in jeopardy. This position is incorrect as a matter of military law. Before a charge may be referred to a general court-martial, it must first be subjected to a thorough and impartial Article 32 investigation. See *Manual for Courts-Martial, United States* para. 34 (Rev. ed. 1969). "An Article 32 investigation is a probable cause type investigation designed to eliminate unfounded charges and gather

[1]The government also argued in this Court that the court of appeals erred in considering the period between October 1970 and January 1975, during which time petitioner was not under any criminal charges, in calculating the length of delay for Sixth Amendment speedy trial purposes. See Brief for the United States, No. 75-1892, at 47-70. The Court had no occasion to reach this issue in view of its resolution of the jurisdictional question.

[2]The Fourth Circuit's ruling is not a "departure" (Pet. 15) from its earlier opinion, which was concerned solely with petitioner's speedy trial claim (see Pet. App. 29).

evidence should a charge be brought to trial." *Calley* v. *Callaway,* 519 F. 2d 184, 215 n.54 (5th Cir. 1975) (en banc), cert. denied, 425 U.S. 911 (1976). It "operates as a discovery proceeding for the accused and stands as a bulwark against baseless charges"; although "[i]t is judicial in nature," it is only "a preliminary proceeding, not a trial on the merits." *United States* v. *Samuels,* 27 C.M.R. 280, 286 (1959). See also *Humphrey* v. *Smith,* 336 U.S. 695 (1949) (discussing the proceeding mandated by the 70th Article of War, 10 U.S.C. (1940 ed.) 1542, supplanted in 1950 by Article 32). Its functional counterparts in federal criminal procedure are the grand jury proceeding (see *MacDonald* v. *Hodson,* 42 C.M.R. 184 (1970)) and the preliminary examination (Fed. R. Crim. P. 5.1). Never has an Article 32 proceeding been found to be more than a preliminary hearing or pretrial discovery proceeding.[3] It is not one of the methods of trying an offense committed by a serviceman. See *Middendorf* v. *Henry,* 425 U.S. 25, 31-32 (1976).

Hence, petitioner could not have been convicted at the Article 32 proceeding. As the Court noted in *Serfass* v. *United States,* 420 U.S. 377, 391-392 (1975), "[w]ithout risk of a determination of guilt, jeopardy does not attach." Since "an accused must suffer jeopardy before he can suffer double jeopardy" (*id.* at 393), petitioner's indictment does not violate the Double Jeopardy Clause. See *Crist* v. *Bretz,* 437 U.S. 28, 32-33 (1978).

[3]The cases relied upon by petitioner are inapposite. In *United States* v. *Cunningham,* 30 C.M.R. 402 (1961), the court determined that an accuser may not serve as the investigating officer conducting the Article 32 proceeding. In discussing the functions of the Article 32 proceeding, the court labeled it an "important pretrial right." *Id.* at 404. *United States* v. *Tomaszewski,* 24 C.M.R. 76 (1957), and *United States* v. *Nichols,* 23 C.M.R. 343 (1957), hold that in an Article 32 proceeding an accused is entitled to either civilian or military counsel or the equivalent. The court termed the proceeding a pretrial hearing (23 C.M.R. at 348) and a discovery proceeding (24 C.M.R. at 78). None of these decisions refers to an Article 32 proceeding as a trial.

2. Based on the investigating officer's report, the commanding general dismissed the charges against petitioner without any reference of the charges for trial by a court-martial. Soon thereafter, petitioner sought and received an honorable discharge from the Army, thus halting any further military prosecution. *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11 (1955). Consistent with Colonel Rock's explicit recommendation (Pet. App. 11), however, the Department of Justice continued to pursue the case, and the murder indictment involved here was returned in January 1975. Since petitioner has never been tried before a military or civilian court on the charges in this indictment, collateral estoppel, which "bars relitigation between the same parties on issues actually determined at a previous trial" (*Ashe* v. *Swenson,* 397 U.S. 436, 442 (1970)), does not preclude his prosecution any more than the failure of one grand jury to return an indictment in a case presented to it collaterally estops a second grand jury from issuing an indictment or the government from prosecuting such an indictment.[4]

In *United States ex rel. Rutz* v. *Levy,* 268 U.S. 390 (1925), for example, defendants had been brought before a United States Commissioner in Illinois to determine whether they should be removed to Ohio to stand trial. After a hearing, the commissioner ordered their discharge for want of probable cause. Subsequently, similar

[4]Petitioner also argues (Pet. 23-25) that his prosecution is contrary to an agreement between the Justice Department and the Department of Defense. In the first place, the agreement is only an intragovernmental allocation of prosecutorial functions, not a constitutionally mandated requirement, and it therefore confers no enforceable rights on criminal defendants. See *Sullivan* v. *United States,* 348 U.S. 170 (1954). More important, the agreement could not have been meant to continue to apply to a situation, such as this case, in which only one of the departments has the authority to act. The Defense Department lost jurisdiction over petitioner after his discharge from the Army.

proceedings were instituted before a federal district judge in Illinois, who ordered the marshal to take defendants into custody. Defendants then sought writs of habeas corpus, claiming that their discharge by the commissioner for lack of probable cause, following an evidentiary hearing, was an adjudication upon that question and a bar to a second proceeding. This Court disagreed (*id.* at 393-394):

> [T]he discharge of an accused person upon a preliminary examination for want of probable cause constitutes no bar to a subsequent preliminary examination before another magistrate. Such an examination is not a trial in any sense and does not operate to put the defendant in jeopardy. * * * The utmost that can be said is that the decision of a commissioner favorable to the accused is persuasive and may be sufficient to justify like action upon a second application; but it is not controlling.

Here, too, the investigating officer's conclusion that the charges against petitioner at the Article 32 proceeding were untrue, while a factor to be considered in determining whether to pursue the case, did not preclude a grand jury four years later, following an "extensive and wide ranging" (435 U.S. at 851) reinvestigation, from finding probable cause to believe that petitioner had killed his wife and daughters and should therefore be indicted for the murders. See also *Morse* v. *United States*, 267 U.S. 80, 85 (1925); *Collins* v. *Loisel,* 259 U.S. 309, 315 (1922).

The criminal cases relied upon by petitioner do not support his collateral estoppel argument. In *United States* v. *Oppenheimer,* 242 U.S. 85 (1916), the defendant had been indicted for conspiracy to conceal assets during bankruptcy. The district court dismissed the indictment on the erroneous ground that the statute of limitations

barred prosecution, but the government did not appeal. Instead, it obtained another indictment, alleging the same offense. This Court upheld the dismissal of the second indictment on the basis of the doctrine of *res judicata*, not collateral estoppel, concluding that "[a] plea of the statute of limitations is a plea to the merits, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution" (*id.* at 87-88; citation omitted). Similarly, in *Ashe* v. *Swenson, supra*, the defendant, who had been tried and acquitted of the robbery of one of six men at a poker game, was charged with the robbery of another of the poker players during the same incident. The Court reversed the defendant's conviction, holding that the judgment of acquittal at the first trial necessarily embodied a finding by the first jury that there was at least a reasonable doubt that defendant was one of the robbers and that the State could not relitigate that issue (397 U.S. at 446-447). In this case, as the court of appeals properly concluded, "because no final judgment of a tribunal having jurisdiction to try [petitioner] has determined an issue of ultimate fact, the prosecution pending in the district court is not barred by * * * collateral estoppel" (Pet. App. 43).[5] See *Montana* v. *United States*, No. 77-1134 (Feb. 22, 1979), slip op. 4-5.

[5]The other cases relied upon by petitioner, all of which involve civil litigation, are equally inapposite. *United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394 (1966), involved an administrative agency that had acted in a judicial capacity in resolving a disputed issue of fact. The Court held that the agency's ruling in such circumstances was entitled to *res judicata* effect. *Id.* at 421-422. Both *Parklane Hosiery Co.* v. *Shore*, No. 77-1305 (Jan. 9 1979), and *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971), deal with the unrelated issue of whether mutuality of estoppel must be present before a party may make either offensive or defensive use of collateral estoppel based on issues resolved in an earlier trial. Finally, there is no conflict with the Second Circuit's decision in *Lummus Co.* v. *Commonwealth Oil Refining Co.*, 297 F. 2d 80 (1961), cert. denied, 398 U.S. 986 (1962). There, the district court in Puerto Rico had enjoined a contract arbitration and a New York court action to compel arbitration on the ground that a dispute existed as to the validity or existence of the contract agreement. The United States Court of Appeals for the First Circuit reversed, however, finding that the party challenging the arbitration (Commonwealth) had failed to present a substantial issue of fraud in the making of the contract. The United States District Court for the Southern District of New York then ordered a trial on the arbitrability of the same contract. The Second Circuit granted mandamus to prohibit the district court from holding the trial, concluding that the issue of the contract's validity had already been resolved by the First Circuit's decision. Hence, unlike the present case, the decisions cited by petitioner each involved instances where a court or agency had resolved a disputed issue of fact while acting in an adjudicatory rather than an investigatory capacity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1979